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ABSTRACT

Intended for use by high school U.S. history and government teachers and students, these scripted trials and related materials are designed to help students develop an understanding about important ideas in the U.S. Constitution. The document focuses on three fundamental issues of the Bill of Rights: search and seizure, freedom of expression, and the establishment clause. These issues help students to examine the civic principles that bind the nation together and to reconcile competing claims about those principles. The scripted trials can take from two to five periods of class time to complete. Each trial is followed by appendices needed to teach the case; key holdings from the actual case or cases upon which the trial was based; and recent and related Supreme Court decisions pertinent to the issues involved in the case. Following an Introduction the book is divided into six chapters. The chapters include: (1) "General Constitutional Principles"; (2) "Search and Seizure"; (3) Freedom of Expression"; (4) "The Establishment Clause"; (5) "Annotated Tables of Supreme Court Cases"; and (6) "Annotated Bibliography of ERIC Resources." The volume concludes with an appendix containing a glossary of terms. (JEH)

TEACHING CONSTITUTIONAL ISSUES WITH SCRIPTED TRIALS:

SEARCH AND SEIZURE, FREEDOM OF EXPRESSION, AND THE ESTABLISHMENT CLAUSE

Volume 1

Robert S. Leming
and Thomas S. Vontz

ERIC Clearinghouse for Social Studies/Social Science Education
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INTRODUCTION

This work is intended for use by secondary school teachers and students of American government or American history. Secondary school American government or history teachers may supplement their existing curriculum with this collection of resources. The volume, however, is not intended as a stand-alone text in American government or history. Many important constitutional issues as well as concepts in American government or history classes are not included in this text. Teachers obtaining a copy of this publication are free to photocopy parts or all of it for classroom use without obtaining prior permission from the ERIC Clearinghouse for Social Studies/Social Science Education.

Constitution-based Scripted Trials

The scripted trials and related materials of this volume are intended to help students develop an understanding of important constitutional issues. They are not intended to help students develop procedural or technical knowledge of courtroom practices. And they are not to be viewed as mock trials. Rather, these scripted trials are pedagogical tools intended to excite student interest and require active student involvement in balancing important controversial issues at the core of constitutional government and citizenship in the United States of America.

The use of constitutional issues and Supreme Court cases to develop the knowledge, skills, and dispositions important in becoming a competent citizen is not a novel idea.[1] The scripted trials in this volume (1) are based on actual cases involving students in school settings; (2) contain constitutional and controversial issues; (3) develop critical thinking and deliberative skills in students; and (4) require students to learn cooperatively. They also help students gain an understanding and an appreciation of diverse points of view. Each of these factors will help to enliven and enrich secondary school American history and government classes. Scripted trials allow students to study constitutional issues in depth and engage the issues and arguments in a new and exciting way.

This volume focuses on three fundamental issues of the Bill of Rights: search and seizure, freedom of expression, and the establishment clause. Subsequent volumes will engage other constitutional issues. To many students, each of the clauses may seem clear enough on first reading; however, as they are applied to specific cases and controversies, their meaning becomes less clear and requires interpretation. The trials and the issues they raise require students to deliberate critically on important constitutional principles and balance the weight of arguments on all sides of an issue.

Although each case is loosely based upon an actual decision or decisions of the Supreme Court, that fact alone does not restrict their use. Decisions of the Court are not immune from careful and close scrutiny by secondary school students. The nature of constitutional issues are such that the justices themselves often do not speak with one clear voice on issues that come before the Court. The study of constitutional issues forces students to examine the civic principles that bind us together as a nation.[2] They force students to reconcile competing claims about the principles. For example, in deciding the censorship powers of public school officials, students must seek arguments from a variety of sources. What legitimate interests do school authorities have in banning books from the library? Do public school students have a right to receive ideas? What kind of books are banned and why is the school administration banning them? Does compulsory schooling affect the school's authority to ban books? Students must balance, as do justices on the Supreme Court, the claims and arguments on all sides of the issues that come before them.

A competent citizenry is required to bring the principles that undergird the Constitution to life. It is, ultimately, the people who will decide, within reasonable limits, the contours of our constitutional government for succeeding generations. Citizens who have engaged important constitutional principles and formulated reasoned judgments about them will be better able to define those principles for themselves and our society.

How To Use this Publication

Although the actual trial may take only one class period, some additional time should be spent prior to the trial framing the issues of the case and after the trial discussing the issues that were raised during the trial. One trial, depending on the level of students and their prior knowledge, may take anywhere from two to five periods of classroom time.

For any of the scripted trials to be successfully incorporated into secondary school history or government classrooms, it is important that students have a good understanding of a variety of factors important to informing their deliberations. In addition to the trials, this work includes supporting material for students to help them frame, analyze, and decide important constitutional issues of each case.

The next chapter, *General Constitutional Principles*, provides important and relevant background information applicable to all of the trials. The topics and their discussion are particularly necessary to fully understanding the issues presented in each trial. For students to carefully deliberate about the restrictions of the establishment clause in the public schools,

for example, they need to understand how people may choose to construct the Constitution, how the establishment cause came to be applied to the states, and how the Court has historically viewed the guarantees of the Constitution in public school settings.

To further aid in the process of preparing for scripted trials, each trial is proceeded by (1) a brief history of the particular clause that is a part of the trial; (2) a brief history of important Supreme Court precedents relevant to the trial; and (3) background information specific to the trial. Teachers should use these sections, in combination with the general constitutional principles in the next chapter, to help frame the issues that are a part of each trial. Again, the more students prepare for the actual trial and subsequent discussions, the more fruitful the use of scripted trials.

The trials require students to role play various parts. Each case includes a judge, bailiff, defendant, plaintiff, and witnesses, as well as two attorneys for both the defense and plaintiff. The remaining class members serve on the jury and "deliver" a decision in the case. The decision may be delivered orally or in writing. Either way, as a part of their decision students should fully explain their reasoning and logic, refer to past precedents of the Court, and apply general concepts in American history and government. Ideally, every student should have a copy of the scripted trial and appropriate supporting material at their disposal throughout the lessons.

Materials immediately following each trial also contain additional useful information for students and teachers. Each trial is followed by (1) appendices needed to teach the case; (2) key holdings from the actual case or cases the trial was based upon; and (3) recent and related Supreme Court decisions pertinent to the issues involved in the case. Students should be encouraged to compare their decision, arguments, and logic with those of the Supreme Court.

An "Annotated Table of Cases," a single "Glossary of Terms" for all trials, and an "Annotated Bibliography of ERIC Resources" appear at the end of this publication. These resources will also assist students and teachers in their efforts to understand the important and complex issues of this volume.

Notes

1. See Toni Marie Massaro, *Constitutional Literacy* (Durham, NC: Duke University Press, 1993), 69-127; Stephen S. Gottlieb, *Teaching about the Constitutional Rights of Students* (Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education, 1992); Robert S. Leming, *Teaching about the Constitutional Rights of Students* (Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education, 1991); John J. Patrick, *How to Teach the Bill of Rights* (New York: Anti-Defamation League of B'nai B'rith, 1991), iii; and, John J. Patrick, *Teaching and Learning About the United States Constitution in Secondary School Courses on American History: Persistent Problems and Promising Practices* (Bloomington, IN: ERIC Clearinghouse for Social Studies/Social Science Education, 1987).
2. Massaro, 1993.

CHAPTER ONE
General Constitutional Principles

Your successful use of the scripted trials in this volume depends upon your familiarity with a few important constitutional topics common to each trial, and a few others specific to the trial you are studying. Although you have already learned about many concepts relevant to the study of constitutional issues throughout your education, this section provides a discussion of five general and important issues particularly relevant to understanding and interpreting the United States Constitution and the trials that are a part of this volume.

The issues that are a part of each trial require you to balance important and sometimes conflicting principles that undergird our system of government. Although there are no easy answers to constitutional questions, there are better or worse arguments. Your knowledge of these general constitutional principles will help you to form a reasoned judgement (i.e., a position supported by sound reasoning and logic) about the difficult constitutional questions that are a part of each trial.

To help you prepare for participation in the scripted trials, then, this chapter briefly discusses (1) natural rights philosophy; (2) judicial review; (3) reading and interpreting the Constitution; (4) the doctrine of selective incorporation; and (5) the Constitution's relationship to the public school environment. Each trial is also preceded by more specific information that relates to the specific issues of the trial.

The following materials refer to many Supreme Court decisions. The Court's past decisions should help to inform your own by laying out the arguments that surround a given issue. They are also important because of the Supreme Court's adherence to *stare decisis*, (Latin for "let the decision stand"). Following the doctrine of *stare decisis*, the Court uses its own precedents to help it decide current cases.

Natural Rights of Individuals

> *We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights; Governments are instituted among Men. . . .*
>
> —Declaration of Independence, 1776

What are rights? The writers of the Declaration of Independence asserted a *right* to separate from Great Britain in 1776. The Supreme Court in *Miranda v. Arizona* (1966) said that people need to be informed of their *rights* before interrogation.[1] A boy on a high school basketball team refuses to get a haircut consistent with team policies and, when suspended from the team, appeals to a *right* to do what he wishes with his hair. We live in a rights culture that traces its roots back to the 18th century.

The philosophical basis for individual rights and liberties that has dominated American thinking from the founding until the present day is based largely upon the writings of two philosophers: John Locke and Thomas Hobbes.[2] Both Locke and Hobbes helped to transform, even revolutionize, thinking about rights in what has become known as natural rights philosophy.

Natural rights are not and cannot be granted to people by their government. According to a natural rights philosophy, rights are independent of government; they belong to all persons equally due to their membership in the human species.

A natural rights philosophy begins by imagining what life would be like without government. What would your life be like in a state of nature without government? In a state of nature, people are born as free, equal, and independent actors. People possess certain unalienable rights that they all share equally by virtue of their humanity. The most basic of these rights are the rights to life, liberty, property, and the pursuit of happiness.

Hobbes went on to assert that life in the state of nature would also be "solitary, poor, nasty, brutish and short." In a state of nature, each person was the solitary guarantor of his or her rights. Thus, each person was set against every other person in perpetual war of each one against every other one. In a situation where everyone was completely free, everyone's rights were completely at risk.

A central tenet of both Locke and Hobbes' political theory addresses the need for people to band together in a community, a civil society, to secure rights. Social contract theory holds that individuals agree to give up to civil society and its government the absolute rights they would possess in a state of nature. In return, they receive protection of rights that would be at risk in a state of nature—life, liberty, property, and the pursuit of happiness. Civil society and government are instituted among men for the purpose of establishing rules and laws by which the rights of each person in the society are secured or protected against predators from within or outside the society.

How much power does a government need to secure natural rights? This was only one of the many issues inherent in attempting to operationalize a natural rights philosophy during the writing of the Constitution in 1787. The new constitutional government would need enough power to protect rights of individuals against predators, but not so much as to be an abuser of individual rights. Through a system of

separated, divided, and limited government, Americans attempted to create such a government.

Judicial Review

One mechanism for checking the powers of government against invasions of individual rights resides in the courts' power of judicial review. Judicial review is the power and duty of the courts to review laws and actions of the government as possible infractions of the Constitution and thus unconstitutional. The rights contained in the Bill of Rights, for example, cannot be infringed by the government without some compelling justification. The courts, then, serve as a protector of individual or minority rights against the power of the majority expressed by the people's representatives in a democratic government.[3]

The power of judicial review, although not explicitly mentioned in the Constitution, has become an important element of our government. The Supreme Court exercises the power to overturn unconstitutional laws or actions of the federal and state governments. How, then, was this important power established in the constitutional government of the United States?

The first case examined in many constitutional law classes, *Marbury v. Madison* (1803), deals precisely with this issue.[4] William Marbury sought a writ of mandamus (an order from the court to do something) from the Supreme Court to compel the government (Secretary of State James Madison) to issue his commission for Justice of the Peace in the District of Columbia, which the executive department had withheld from him. Marbury's suit originated in the Supreme Court. Section 13 of the Judiciary Act of 1789 granted original jurisdiction to the Supreme Court in mandamus cases. However, Chief Justice John Marshall's reading of Article Three, Section Two of the Constitution limited the Supreme Court's original jurisdiction to "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be a party." Therefore, according to Marshall, Section 13 of the Judiciary Act of 1789 violated the Constitution by granting too much original jurisdiction to the Supreme Court.

Marshall reasoned that when a law enacted by Congress conflicts with the Constitution, it is the power and duty of the courts to declare the law unconstitutional and void. Marshall argued: (1) the Constitution was a written document of supreme law that limited government; (2) since we have a government of limited powers the government may not ignore the limits; (3) it is emphatically the province and duty of judges to say what the law is; and thus, (4) the Court must have the power to investigate constitutionality and declare laws unconstitutional. *Marbury* marked the first time the Supreme Court declared an action of a co-equal branch of the federal government, the Congress, unconstitutional and therefore void.

Because it established such an important constitutional principle, *Marbury v. Madison* (1803) is one of the most thoroughly analyzed Supreme Court cases in American history. One of the many critiques of Marshall's decision in *Marbury* is that he misread Article Three, Section Two of the Constitution. This clause could have served as a floor for original jurisdiction instead of a ceiling. In other words, the clause might have been interpreted to mean that the Court had original jurisdiction in at least these types of cases (e.g., ones effecting ambassadors . . .), but could have had original jurisdiction in many others. The controversy surrounding the *Marbury* decision is just one example of the issues and challenges justices and citizens face when reading and interpreting the Constitution.

Reading and Interpreting the Constitution

When reviewing laws and actions of government, the nine members on the Supreme Court often disagree about constitutional issues. How is it that nine highly educated and intelligent people could more often than not disagree about their area of expertise—constitutional law? Put another way, how is it that different members of the Supreme Court derive very different meaning from the same document?

Many parts of the Constitution are vague, ambiguous, and require interpretation. This section describes three common positions about how to read and interpret the Constitution.[5]

First, some justices and scholars favor some version of original understanding or original meaning when reading the Constitution. Adherents of this view believe that when reading the Constitution, judges and citizens need to interpret the Constitution according to what the words and clauses meant to the people at the time the Constitution or any of the Amendments were ratified.[6] They use historical evidence to guide their interpretation of the Constitution.

Proponents of original understanding argue that anything less requires judges to infuse their own values into the Constitution. Further, they argue, a judge's job is to apply the law, not to make it. As judges' move away from original understanding, they begin to resemble legislators more than jurists. In every other area of the law, originalist's contend, judges seek original or legislative intent in applying the law to specific cases. Why should constitutional law be any different?

Second, other legal theorists and justices argue that the Constitution is a living document and needs to change as society changes. Why, they argue, should the living be governed by the dead? Justices on the Supreme Court and citizens need to use contemporary social values in interpreting the Constitution. Society today is much different than when the Constitution and Bill of Rights were written and supreme law needs to change accordingly. It is uniquely the responsibility of judges to reconcile the Constitution to today's values.

Third, other legal theorists and judges take some position in between. They argue that when reading the Constitution, people should be mindful of the fundamental principles that underlie the document as a whole as well as specific clauses, but they should not so rigidly adhere to original understanding as to leave no room for constitutional change. Although the equal protection clause, for example, might have originally been intended for newly freed slaves, that should not stop judges or citizens from applying the basic concept of equal protection under the law to other groups in American society.

Doctrine of Selective Incorporation

Another issue common to each of the trials is how the protections of the Bill of Rights, originally intended as safeguards only against the national government, came to be applied against the states. The First Amendment clearly states that "*Congress* shall make no law. . . ." In 1833 (*Barron v. Baltimore*), Chief Justice John Marshall confirmed, forty-two years after the ratification of the Bill of Rights, that their protections limited only the power of the federal government.[7]

The ratification of the Fourteenth Amendment in 1868 ushered in, although not immediately, an important concept (i.e., substantive due process) in constitutional jurisprudence that paved the way for application of the Bill of Rights against the states. The language of Article One in the Fourteenth Amendment clearly restricts and applies to states:

> *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Although it was clear that the privileges and immunities, due process, and equal protection clauses of the Fourteenth Amendment were restrictions on states, it was much less clear what those clauses meant when applied to the states.

The Slaughterhouse Cases (1873) were the first opportunity for the Court to give meaning to the three "empty vessels" of the Fourteenth Amendment.[8] In the *Slaughterhouse Cases*, the Court narrowly constructed each of the three clauses of the Fourteenth Amendment so as to give them little utility in the protection of individual rights against infractions by state governments. Two of the clauses, due process and equal protection, have made significant "comebacks" from their early interpretation and have become important components of constitutional jurisprudence. The privileges and immunities clause, however, continues to be narrowly defined and provides little protection for individual rights.

The Court established the "doctrine of selective incorporation" to justify its use of the due process clause of the Fourteenth Amendment to apply the Bill of Rights to the states. This doctrine grew out of the Court's use of substantive due process in declaring laws and actions unconstitutional. What follows briefly traces that development.

In *Hurtado v. California* (1884), the Court clearly stated that the Bill of Rights does not apply to the states, even in relation to the due process clause of the Fourteenth Amendment.[9] The due process clauses of both the Fifth and Fourteenth Amendments meant the same thing and meant something different than the procedural protections listed in the Fifth Amendment and, by extension, the rest of the Bill of Rights.[10] After all, the Court reasoned, why would the framers have included a due process clause in the Fifth Amendment if it merely meant to guarantee the other protections included in the Fifth Amendment or in the remainder of the Bill of Rights?

On its face, the due process clauses of both the Fifth (requiring "due process" at the federal level) and Fourteenth (requiring "due process" at the state level) Amendments require fair procedures for the government to deprive "persons of life, liberty, or property." Beginning in the 1890s, however, the Court began to use the idea of substantive due process to invalidate actions of state governments.[11] According to the reasoning of substantive due process, state action that infringes upon *fundamental* liberty or property interests, regardless of the procedures used in doing so, will be exposed to exacting judicial scrutiny and more often than not be found in violation of the Constitution. If the substance or meaning of a state action affects a fundamental liberty or property interest, then states must show their infringements are *necessary* to achieve some *compelling* governmental purpose.[12]

In particular, the Court during the latter part of the 19th century and early part of the 20th century gave substantive protection to state action that interfered with fundamental economic liberties. Although a state might have used the fairest of procedures in passing a law restricting child labor, for example, the law could still be unconstitutional because its substance or meaning had the effect of interfering with a fundamental liberty--the right to contract between freely consenting individuals.[13]

A New York case illustrates the Court's use of economic substantive due process. Using its police powers (i.e., powers employed by the state to reasonably protect the health, safety, and welfare of its citizens), New York passed a law regulating labor in the baking industry. Among other regulations, the law stated that bakers could work no more than 60 hours in one week or ten hours in one day. The Supreme Court in *Lochner v. New York* (1905) ruled that the regulation went beyond the scope of New York's police powers and interfered with the fundamental liberties of both employees and employers to contract.[14] The fundamental right to contract was contained in the due process clause of the Fourteenth Amendment and more specifically the word "liberty." Again, the Court did not consider the procedures New York used in passing the law; rather, the Court identified a

fundamental liberty, the right to contract, that the substance or effect of the New York law offended. The state of New York could not provide compelling justifications for such an infringement; thus the law was ruled unconstitutional.

The Court eventually overturned all of its economic substantive due process decisions. However, it began giving substantive protection to other categories of rights via the due process clause of the Fourteenth Amendment.[15] Many Supreme Court justices reasoned if laissez-faire economic principles could be read into the due process clause of the Fourteenth Amendment, so could other "fundamental rights" listed in the Bill of Rights. Thus, the concept of substantive due process became important for the incorporation of particular rights contained in the Bill of Rights by the Fourteenth Amendment.

In 1908 the Court chose not to incorporate the self-incrimination clause of the Fifth Amendment in *Twining v. New Jersey*.[16] However, the *Twining* decision opened the possibility that other rights in the Bill of Rights might deserve substantive protection under the due process clause. The Court stipulated in *Twining* that rights that were "fundamental principles of liberty and justice" or ones that "inhere in the idea of a free government" were "fundamental" and deserved substantive protection by the Court through the Fourteenth Amendment's due process clause.

In *Gitlow v. New York* (1925), the Court said that the freedom of speech and press in the First Amendment was a part of the "liberty" contained or incorporated in the due process clause of the Fourteenth Amendment.[17] Freedom of speech and press were among the fundamental personal liberties afforded protection through the concept of substantive due process. States, then, would be held to the same standards as the federal government in freedom of speech or press cases.

Since *Gitlow*, the Court has followed the "doctrine of selective incorporation" and has come to apply, on a case-by-case basis, most of the Bill of Rights to the states through the Fourteenth Amendment.[18] As cases that involved state governments and specific clauses of the Bill of Rights came before the Court, the Court decided whether or not the specific protection in the Bill of Rights was "fundamental" and deserving of substantive protection and therefore incorporation through the Fourteenth Amendment.

To date, the Court has rejected Justice Hugo Black's arguments for complete incorporation of the Bill of Rights[19] and has decided to give those rights (inside and outside of the Bill of Rights) substantive protection if they are considered "fundamental." To test if a right is indeed fundamental, the Court asks two questions. Is the right implicit in the concept of ordered liberty?[20] Is the right deeply rooted in our nation's history and traditions?[21] If "yes" can be answered to both of these questions, the right, regardless of its appearance in the Bill of Rights, is deemed fundamental and is applicable against state government to protect individuals through the due process clause of the Fourteenth Amendment.[22]

The year 1937 marks a turning point in constitutional jurisprudence, including the Court's use of substantive due process. Whereas prior to 1937, the Court gave substantive protection primarily against state action that seemed to infringe upon economic liberties,[23] after 1937 the Court began giving strict judicial scrutiny and therefore substantive protection to individuals in cases that involved (1) the Bill of Rights; (2) the protection of the rights of "discrete and insular minorities"; or (3) rights that tended to "seriously curtail the operation of those political processes ordinarily relied upon to protect minorities."[24]

In what has become one of the most famous footnotes in the history of constitutional law, Justice Stone's famous footnote four in the *Carolene Products Case* (1937) set out the general principles of Constitutional construction that the Court has followed since. Civil and political rights were the most fundamental categories of rights, and state action that interfered with these categories of rights would be considered highly suspect by the Court requiring the state to show a compelling and convincing argument for its interference. The Court's primary function, according to footnote four, is to protect minority rights against majority rule. Footnote four also paved the way for the Court to begin thinking about rights in terms of group membership and not exclusively on an individual basis.[25]

Public Schools and the Constitution

Since each of the scripted trials in this volume involves students in public school settings, it is also important to consider the ways that the Supreme Court has traditionally viewed the public school, its students, and their relationship to the Constitution.

The word "education" does not appear anywhere in the Constitution. Obtaining an education is not a "right granted to individuals by the Constitution;"[26] but neither is it merely a "benefit provided by states."[27] Education is provided and mostly regulated by the states through those state powers "reserved to the states respectively" by the Tenth Amendment. Recognizing the fundamental importance of education in maintaining a democratic society, every state provides for the free public schooling of its citizens. In fact, education was considered so important that between 1852 and 1918 nearly every state passed compulsory attendance laws requiring attendance to some age between 14-18.[28]

The importance of education in maintaining a free and democratic society has long been recognized by the Supreme Court.[29] Some justices, such as Thurgood Marshall, went so far as to assert that an individual's interest in education is fundamental because of "the close relationship between education and some of our most basic constitutional values."[30]

The importance of education and therefore the maintenance of a healthy school environment has influenced the Court to provide school officials with wide latitude in their restrictions on the constitutional rights of students. The doctrine of *in loco parentis* (Latin for "in the place of parent"), for example, was used by the Court in its early decisions involving students and the Constitution. The doctrine gives school officials roughly the same authority as parents in its dealings with students in the school environment. *New Jersey v. T.L.O.* (1985), however, laid to rest the doctrine of *in loco parentis* as a basis for the school's authority.[31]

Although maintaining a system of education and providing a healthy learning environment are important functions of states, students "do not shed their constitutional rights. . . at the schoolhouse gate."[32] A student's constitutional rights need to be examined, however, in light of the special circumstances of the school environment. On most matters involving constitutional issues in the school environment, the Court has historically given great deference to the decisions of school officials.

Notes

1. *Miranda v. Arizona*, 384 U.S. 436 (1966).
2. For a good discussion of rights thinking in American generally and of Locke and Hobbes specifically, see Gary L McDowell, "The Explosion and Erosion of Rights," in *The Bill of Rights in Modern America After 200 Years*, ed., David J. Bodenheimer and James W. Ely, Jr. (Bloomington, IN: Indiana University Press, 1993), 18-35; and, Daniel T. Rogers, "Rights Consciousness in American History," in *The Bill of Rights in Modern America After 200 Years*, ed., David J. Bodenheimer and James W. Ely, Jr. (Bloomington, IN: Indiana University Press, 1993), 3-17.
3. "Jim Crow" laws, or laws requiring the separation of the races, are examples of laws that were the result of the democratic process, but violations of individual rights nonetheless.
4. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
5. For a more detailed discussion of constitutional construction, see Laurence H. Tribe, *On Reading the Constitution* (Cambridge, MA: Harvard University Press, 1991); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990), 133-261; and, Jack N. Rakove, *Interpreting the Constitution: The Debate Over Original Intent* (Boston: Northeastern University Press, 1990)
6. For an analysis of the original intentions of the framers of the Constitution, Bill of Rights, and its use by the Supreme Court see, Leonard W. Levy, *Original Intent and the Framers Constitution* (New York: Macmillan Publishing Co., 1988).
7. *Barron v. Baltimore*, 32 U.S. 243 (1833).
8. *The Slaughterhouse Cases*, 83 U.S. 36 (1873).
9. *Hurtado v. California*, 110 U.S. 516 (1884).
10. For a more elaborate discussion of *Hurtado* see Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development, Volume II* (New York: W.W. Norton & Co., 1991), 516-517.
11. These cases do not, however, illustrate the first use of substantive due process. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856). The Taney Court in *Dred Scott* declared a federal law, the Missouri Compromise of 1820, unconstitutional by way of the due process clause of the Fifth Amendment, which clearly applied to the national government. The Taney Court reasoned, in part, that the meaning and effect of the Missouri Compromise deprived people of "property" (by forbidding slavery north of a particular line) and therefore was unconstitutional.
12. The Court has established three tests for substantive due process cases. Fundamental rights (e.g., procreation, marriage, privacy, family matters) invoke strict scrutiny. Strict scrutiny requires the government officials to show their action is *necessary* to achieve some *compelling* public interest. Less than fundamental rights (e.g., gender-based rights) invoke intermediate scrutiny. At this level, the government has the burden of showing that the action is *closely tailored* to some *important* public purpose. In all other cases, the individual has the burden of showing that the state action is not *rationally related* to some *legitimate* public purpose. Again, only fundamental rights receive strict scrutiny. Similar tests are used in equal protection cases.
13. See *Allgeyer v. Louisiana* 165 U.S. 578 (1897). In the *Allgeyer* decision, the Court resoundingly defended laissez-faire economic principles and in particular gave fundamental protection to the liberty to contract.
14. *Lochner v. New York*, 198 U.S. 45 (1905).
15. After 1937, the Supreme Court overturned all of its earlier decisions that afforded substantive protection and constitutional preference to economic liberties. See, for example, *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937); *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937). See also John J. Patrick, "Court-Packing Plan," in the *Young Oxford Companion to the Supreme Court* (New York: Oxford University Press, 1993), 88-89, for a brief explanation of "Court-packing" and its role in the reversal of these earlier decisions.
16. *Twining v. New Jersey*, 211 U.S. 178 (1908).
17. *Gitlow v. New York*, 268 U.S. 652 (1925). One earlier precedent for incorporation should also be noted. In *Chicago, Burlington, and Quincy Railroad Company v. Chicago*, 166 U.S. 266 (1897) the Court ruled that the due process clause of the Fourteenth Amendment prohibited states from taking private property without just compensation—a provision of the Fifth Amendment. However, the Court expressly denied the textual relationship between the Fourteenth Amendment and the Bill of Rights.
18. Not all of the rights included in the Bill of Rights have been incorporated. The Second and Third Amendments to the Constitution, for example, have not, as of yet, been incorporated.
19. See Justice Black's lengthy dissent in *Adamson v. California*, 332 U.S. 446 (1947).
20. See *Palko v. Connecticut*, 302 U.S. 319 (1937).
21. See *Moore v. East Cleveland*, 431 U.S. 494 (1977).
22. Of course, the Court's test for fundamental rights is not a precise formula. Most issues usually hinge upon the "level of generality" the justices use in asking the two questions. For example, in *Bowers v. Hardwick* 478 U.S. 186 (1986) the constitutionality of a Georgia sodomy law was challenged as a violation of the liberty protected by the concept of substantive due process. Did the Georgia law restricting sodomy violate a fundamental right? Five of the Justices agreed with Justice White and said "no." The Justices in the majority held that the right to engage in homosexual sodomy is not implicit in the concept of ordered liberty; nor is it deeply rooted in our nation's history and traditions. However, four of the justices would have asked the questions at a much higher level of generality. Justice Blackmun, joined by three others in dissent, asked is the "right to be let alone" implicit in the concept of ordered liberty and deeply rooted in the history and tradition of our nation? At this higher level of generality, the justices answered "yes" to both questions making the right fundamental and requiring the use of strict scrutiny in the case.
23. Prior to 1937, the Court did occasionally give some rights that were not related to laissez-faire economic principles or in the Bill of Rights, substantive protection. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), for example, the Court struck down a Nebraska law that prohibited the teaching of any subject in a language other than English during the first eight grades. The Court reasoned that Meyer (the teacher) had a fundamental right to teach German and that the parents had a similarly important right to employ him to that end. Nebraska had failed to show any important state interest that would compel the state from interfering with these rights.
24. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
25. See McDowell, 30.

26. See *San Antonia School District v. Rodriguez*, 411 U.S. 1 (1973).
27. See *Plyler v. Doe*, 457 U.S. 202 (1982).
28. Arval A. Morris, *The Constitution and American Education, Second Edition* (St. Paul, MN: West Publishing Co., 1980), 58-59. The rise of compulsory attendance laws during the last half of the 19th century is also related to a more general movement against child labor. Although the Court has not ruled specifically on the constitutionality of compulsory attendance laws, compulsory attendance laws were "assumed" constitutional in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Pierce* the Court "assumed" that states could compel school attendance; but not restrict compulsory attendance solely to public schools.
29. See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Ambach v. Norwick* 441 U.S. 68 (1979); or, Justice Brennan's concurring opinion in *Abington School District v. Schempp*, 374 U.S. 203 (1963).
30. *Plyler v. Doe*, 1982.
31. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). "Such reasoning (the doctrine of *in loco parentis*) is in tension with contemporary reality and the teachings of this Court. . . In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the Fourth Amendment."
33. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

CHAPTER TWO
Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

—Amendment Four, United States Constitution

The trial of *State v. Jamie L. Potter* raises several important constitutional issues. Among other issues, you are asked to decide whether or not Vice Principal Strict's search of Jamie's book bag violated Jamie's rights as protected by the Fourth Amendment's prohibition against unreasonable searches and seizures. These introductory materials will help you to frame, debate, and ultimately decide this important and controversial question.

Search and Seizure Issues

Justice William J. Brennan, in *Lopez v. United States* (1963) argued that, "The evil of the general warrant is often regarded as the single immediate cause of the American Revolution."[1] The inclusion of the Fourth Amendment in the Bill of Rights was a direct result of the common use of general warrants and writs of assistance by British authorities during the colonial period. Writs of assistance were issued to enforce customs laws and allowed British officials broad authority to invade the privacy of homes and businesses and to seize various kinds of property, not all of which was the subject of the search.[2] A brief history of searches and seizures during the colonial and founding eras will help you to more fully understand and appreciate the constitutional issues presented in *State v. Jamie L. Potter.*

In contrast to the directives of the Fourth Amendment that require "probable cause" and particularity when searching or seizing people or property, officers during the colonial period commonly received general warrants for simply suspecting violations of the law. Further, the magistrate issuing the warrant did not customarily seek additional information from the officers attempting to obtain the warrant to ensure they had a good reason to search or seize.[3] Despite English common law that prohibited judges from issuing general warrants, in 1662 the English Parliament passed a law that permitted the issuing of general warrants called writs of assistance to search for goods that had entered the country in violation of customs laws. The writs of assistance broadly authorized officers to enter into any home or business and search for and seize all "prohibited and unaccustomed" goods.

Colonists who opposed the issuing of general warrants could draw upon a rich English tradition of opposition to the same. General warrants violated, according to many Englishmen of the 17th and 18th centuries, the privacy and security of one's property and possessions. The decision in *Semayne's Case* (1604) is one early example of British opposition to writs of assistance.[4] While the decision recognized the authority of the appropriate King's agents to, upon notice, break and enter to arrest or execute the King's process, the decision also recognized the right of homeowners to protect their property from unlawful entry even by the King's agents.

Once writs were issued, they remained in effect during the entire lifetime of the sovereign and until six months after his death. The death of King George II in 1760 precipitated the issuing of new writs and an opportunity for colonists to voice their opposition to the general warrant. When a customs officer petitioned the high court of Massachusetts for the issuance of a new writ of assistance, James Otis, representing "the people of Boston," appeared at the trial to oppose the issuance of new writs on libertarian grounds.[5] Otis attacked writs of assistance, during *Paxton's* case (1761), because of their breadth and duration, and because they allowed government officials to violate an essential principle of English liberty (i.e., "a man's house is his castle"). Otis reasoned that only special warrants to search specific property and seize specific things that were supported by an oath of suspicion were just and legal. Otis went on to assert that an act of Parliament that authorized general warrants was contrary to the British constitution and therefore void.[6]

The sentiment against the general warrant that had developed during the colonial period was expressed in several state constitutions after the Declaration of Independence. Article Ten of the Virginia Declaration of Rights observed:

That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.[7]

Although this article clearly denounces the general warrant and argues for probable cause and particularity, it also contains no specific prohibitions (i.e., "ought not to be granted").

One of the clearest and most direct prohibitions of illegal searches and seizures from 1776-1787 can be found in Article Fourteen of the Massachusetts Declaration of Rights. The primary author of Article Fourteen, John Adams, had attended *Paxton's Case* and took notes as James Otis argued against the general warrant.[8] Article Fourteen claims that "every subject has a right to be secure from all unreason-

able searches, and seizures of his person, his house, his papers, and all his possessions."[9] The Article goes on to assert that all warrants should be "supported by oath or affirmation" and should specially designate the "persons or objects of search, arrest, or seizure."[10]

Although sentiment against the general warrant was high during the founding period, many states continued to employ a general warrant until the writing of the Constitution and for some time after. Maryland, New York, North and South Carolina, and Georgia all employed general searches to enforce their tax laws.[11]

Judicial Interpretation

The Supreme Court, as the final arbiter of the Constitution, has helped to provide more meaning to the prohibitions of the Fourth Amendment as they apply to specific cases and controversies. A brief history of how the Supreme Court has interpreted and applied the Fourth Amendment should help you to more precisely frame the issues in the *Potter* case and help you decide its constitutional elements. Past precedents not only expose the issues and arguments contained in the clause, they are also important guideposts in deciding current cases through the doctrine of *stare decisis* (i.e., current courts look to past courts for guidance and direction).

Generally, the Fourth Amendment demands that government officials need a warrant issued by a neutral magistrate[12] based upon probable cause[13] to search a specific place.[14] This general rule, however, becomes less clear as it is applied to specific cases. Just what constitutes probable cause? How specific does a warrant need to be? What happens to evidence that is seized without a warrant or probable cause?

Like other parts of the Bill of Rights, few Fourth Amendment cases came before the Supreme Court during the 19th century.[15] The first search and seizure case of real significance was the *Boyd Case* (1886).[16] Although the offenses involved in the case are trivial, the Court's decision was not.[17] The Court ruled that if evidence against the Boyd brothers was obtained unconstitutionally, even if it proved the government's case, it could not be constitutionally admitted into evidence. The Court reasoned that a close relationship existed between the Fifth Amendment's prohibition against self-incrimination and the Fourth Amendment's prohibition against unreasonable searches and seizures. Once the Court ruled that the search was a violation of the Fourth Amendment, the Fifth Amendment prevented using the evidence during prosecution.[18]

In 1914, the Supreme Court anchored this basic doctrine of the Fourth Amendment in the landmark case of *Weeks v. United States* (1914).[19] The Court argued that evidence gathered in an illegal manner should be excluded from court proceedings. By establishing the exclusionary rule, the Court strengthened the Fourth Amendment's protection against unreasonable searches and seizures. However, as a result of the decision and application of the exclusionary rule to federal cases, some individuals guilty of crimes would not be prosecuted solely because the evidence proving their guilt had been obtained unconstitutionally.

Although the *Weeks* decision mandated the exclusionary rule in federal cases, two thirds of the state court systems rejected its use at the state level. Many state courts continued to argue that the rule placed an unnecessary burden on the police and favored the guilty. In 1949 the Supreme Court rejected the argument that the exclusionary rule ought to apply to the states through the due process clause of the Fourteenth Amendment.[20] The Court reasoned in *Wolf v. Colorado* (1949) that since the exclusionary rule was not directly mentioned in the Constitution or the Bill of Rights and since states had other means available to assist them in preventing illegal searches, states should not be compelled to adhere to the rule.[21]

Wolf was eventually overturned by *Mapp v. Ohio* (1961), which expanded the rights of the accused by applying the exclusionary rule to all criminal trials—both federal and state.[22] The case began when the Cleveland police knocked on Ms. Mapp's door looking for a fugitive from justice. Ms. Mapp refused to let the police enter because they did not have a search warrant. The police left, but returned three hours later and demanded entry. Because Ms. Mapp did not respond, the police broke into the house. Standing in a hallway, she asked to see a search warrant. A police officer waved a piece of paper in front of Ms. Mapp. She grabbed it, but before she could read it, the police officer grabbed it back and proceeded to handcuff her. Although the police did not find the fugitive from justice, they did find some pornographic magazines in an old small trunk in the basement. Ms. Mapp was arrested, found guilty of possessing obscene materials, and sentenced to a year in jail.

Mapp appealed her case to the Supreme Court, where her attorneys argued that actions taken by the police violated her Fourth Amendment right to be protected against unreasonable searches and seizures. The state attorneys, however, argued that no matter how badly the police behaved, their actions did not change the facts in the case and contended that the Court should follow their earlier *Wolf* decision. Ms. Mapp was guilty of possessing the obscene materials, therefore, her conviction should stand.

The Supreme Court disagreed with the state of Ohio, and overturned Mapp's conviction. The Court would not tolerate the excessive use of power exhibited by the Cleveland police. The decision extended the exclusionary rule, for the first time, to state criminal proceedings. The ruling was aimed at deterring police misconduct during searches and seizures and in preserving the integrity of trial courts by shielding them from tainted evidence.

Since 1961, the ruling has provoked heated and lengthy discussions about the merits of the exclusionary rule. In recent years, the Supreme Court has approved a number of exceptions to the exclusionary rule. Courts can admit evi-

dence that nonetheless has been found in violation of the Fourth Amendment if (1) a criminal defendant takes the stand to testify in his/her own defense (evidence illegally seized can be used to impeach his/her testimony);[23] (2) it was illegally obtained from co-conspirators or co-defendants and not the defendant himself/ herself;[24] (3) the prosecution can show a sufficient attenuation of the link between police misconduct and obtaining of the evidence;[25] or (4) the authorities were acting in "good faith" (i.e., the police were executing a search warrant that turns out to be technically defective or, through a judge's error, turns out not to be based on probable cause).[26]

Not all searches or seizures, however, require a warrant. The Court has identified a number of types of searches and seizures that are constitutionally permissible depending on the circumstances of a given case. The Court has made the following exceptions to the general warrant requirement: (1) stop and frisk;[27] (2) incident to arrest;[28] (3) vehicular searches;[29] (4) vessel searches;[30] (5) consent searches;[31] (6) border searches;[32] (7) "open fields;"[33] (8) public school;[34] (9) government offices;[35] (10) regulation of probation;[36] and, (11) drug testing.[37]

These exceptions to the exclusionary rule raise another important Fourth Amendment issue: threshold applicability. Do people enjoy the same protection from unreasonable searches and seizures no matter where they are or what is being searched? The answer, quite clearly is no—it depends on the circumstances. Justice John Marshall Harlan described the threshold requirement in his concurring opinion in *Katz v. United States* (1967) with language that has been frequently employed since. People enjoy protection from unreasonable searches and seizures where they have "a reasonable expectation of privacy."[38] Harlan went on to brake down the requirement into two components: (1) people must, themselves, have an expectation of privacy; and (2) society must objectively recognize such an expectation as reasonable.

Search and Seizure in the Public Schools

As with many of the rights guaranteed by the Constitution, the Supreme Court has ruled that students do not enjoy the same level of protection against unreasonable searches and seizures (because of the special circumstances of the school environment) as do citizens in other settings. The case of *New Jersey v. T.L.O.* (1985) established different standards for searches in school settings.[39] In a 5-4 decision, the Court concluded that school officials do not need a search warrant or "probable cause" to conduct a reasonable search of a student. Unlike the police and other government agents in society at-large, school officials were given the authority to conduct searches and seizures based only on a "reasonable suspicion" that wrong-doing would be discovered. Justice Byron White, writing for the majority, reasoned that the special characteristics of school settings and teacher-student relationships "make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a non-school setting."[40]

In *T.L.O.*, the Court established a two-prong test for judging the "reasonableness" of school searches. First, the search must be justified at its inception; that is, there must be reasonable grounds for suspecting that the search will discover evidence that the student "violated or is violating the law or school rules."[41] Second, the search must be "reasonably related in scope to the circumstances which justified interference in the first place."[42] The "scope" of the search must be based on the following criteria: 1) the procedures used in the search must be related to what the search is looking for; and 2) the procedures used must not be excessively intrusive, taking into account the student's age, sex, and the nature of the infraction.

The quest to understand the Constitution and Bill of Rights requires that citizens balance the sometimes conflicting values that undergird our system of government and society. The inevitable paradox between the protection of individual rights and the need for an ordered society is at the heart of most constitutional questions. The particular issues addressed in *State v. Jamie L. Potter* involve the balance between a student's right to be protected against unreasonable searches and seizures and the school's need to contain a drug problem that disrupts the school environment. The scripted trial you are about to read requires you to engage the arguments and form a reasoned judgement about these important issues.

Notes

1. *Lopez v. United States*, 373 U.S. 427 (1963).
2. Leonard W. Levy, *Original Intent and the Framer's Constitution* (New York: Macmillan Publishing Co., 1988), 221.
3. Levy, 225.
4. *Semayne's Case*, Coke's Rep. 91a, 77 Eng. Rep. 194 (K.B. 1604).
5. *Paxton's Case*, Quincy's Massachusetts Reports, 1761 (1761-1772), App. I, 395-540.
6. Levy, 228.
7. *Virginia Declaration of Rights*, as cited in Levy, 236.
8. Levy, 227
9. *Massachusetts Declaration of Rights*, as cited in Levy, 239.
10. *Massachusetts Declaration of Rights*, as cited in Levy, 239.
11. Levy, 240.
12. See *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Giordenello v. United States*, 357 U.S. 480 (1958); and, *Katz v. United States*, 389 U.S. 347 (1967).
13. See *Dumbra v. United States*, 268 U.S. 435, (1925). "[T]he term 'probable cause'. . . means less than evidence which would justify condemnation," see *Lock v. United States*, 11 U.S. (7 Cr.) 339 (1813). Probable cause may rest upon evidence that is not legally competent in a criminal trial. See *Draper v. United States*, 358 U.S. 307 (1959). Finally, the evidence to justify a warrant need not be sufficient to prove guilt in a criminal trial. See *Brinegar v. United States*, 338 U.S. 160 (1949).
14. *Marron v. United States*, 275 U.S. 192 (1927); or, *Stanford v. Texas*, 379 U.S. 476 (1965). Of course, police who are lawfully on the premises pursuant to a warrant may seize evidence of crime in "plain view" even if that evidence is not described in the warrant. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).
15. The infrequent use of the Fourth Amendment during the 19th century is attributable to several factors: (1) the Amendment was yet to be incor-

porated against the states; (2) the federal government's criminal jurisdiction was rarely invoked; and, (3) the right to appeal to the Supreme Court in criminal cases was not granted until 1891. Of the Fourth Amendment cases preceding *Boyd v. United States*, 116 U.S. 616 (1886), perhaps the most significant was *In re Jackson*, 96 U.S. 727 (1878) where the Court ruled that the Fourth Amendment prohibited the Post Office from opening sealed letters. See Jacob W. Landynski, *Search and Seizure and the Supreme Court* (Baltimore: Johns Hopkins Press, 1966), 49.

16. *Boyd v. United States* 116 U.S. 616 (1886).
17. The Boyd brothers, New York merchants, were accused of importing too much glass without paying the import tax. In order to prove their case, the government needed to show how much glass the Boyd brothers had imported. The Court ordered them to produce invoices for the glass they had imported.
18. For a more complete discussion of the doctrine of selective incorporation see Chapter One of this volume.
19. *Weeks v. United States*, 232 U.S. 383 (1914).
20. *Wolf v. Colorado* 338 U.S. 25 (1949).
21. Civil remedies, such as "the internal discipline of the police, und.r the eyes of an alert public opinion," were sufficient. See *Wolf v. Colorado* (1949).
22. *Mapp v. Ohio*, 367 U.S. 643 (1961).
23. See *United States v. Havens*, 446 U.S. 620 (1980); and, *Walder v. United States*, 347 U.S. 62 (1954). The impeachment exception applies only to the defendant's own testimony and may not be extended to use illegally obtained evidence to impeach the testimony of other defense witnesses. See *James v. Illinois*, 493 U.S. 307 (1990).
24. See *Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Salvucci*, 448 U.S. 83 (1980); or, *Rawlings v. Kentucky*, 448 U.S. 98 (1980).
25. *Wong Sun v. United States*, 371 U.S. 471 (1963); or, *Alderman v. United States*, 394 U.S. 165 (1969).
26. *United States v. Leon*, 468 U.S. 897 (1984).
27. *Terry v. Ohio*, 392 U.S. 1 (1968).
28. The exception to the warrant requirement incident to a lawful arrest originates in English common law. See William W. Greehalgh, *The Fourth Amendment Handbook: A Chronological Survey of Supreme Court Decisions* (Chicago, IL: American Bar Association, 1995), 10-11. See also, *Weeks v. United States*, 232 U.S. 383 (1914).
29. *Carroll v. United States*, 262 U.S. 132 (1925).
30. *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).
31. *Amos v. United States*, 255 U.S. 313 (1921).
32. *United States v. Ramsey*, 431 U.S. 606 (1977).
33. *Hester v. United States*, 265 U.S. 57 (1924).
34. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).
35. *O'Conner v. Ortega*, 480 U.S. 709 (1987).
36. *Griffin v. Wisconsin*, 483 U.S. 868 (1987).
37. *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989).
38. *Katz v. United States*, 386 U.S. 954 (1967).
39. *New Jersey v. T.L.O.*, 1985.
40. *New Jersey v. T.L.O.*, 1985.
41. *New Jersey v. T.L.O.*, 1985.
42. *New Jersey v. T.L.O.*, 1985.

The Scripted Trial Case: *State v. Jamie L. Potter*

Background Information: *State v. Jamie L. Potter*

Jan Power-Tripp, a teacher at Privacy County High School, discovered two students smoking cigarettes in a school restroom. Both students were escorted to the principal's office and were confronted by the Vice Principal, I. M. Strict. One of the students admitted to smoking, but the other student, 17-year-old Jamie Potter, denied the accusation. The vice principal took Jamie into a private office and asked to examine the student's book bag. While searching the book bag, Strict found a package of cigarettes and a package of cigarette rolling papers. Based on years of experience, the vice principal associated the rolling papers with smoking marijuana. Because of this suspicion, Strict decided to search the entire purse and found a small amount of marijuana, a pipe, several empty plastic bags, a large sum of money, a list of names which appeared to be students who owed Jamie money, and two letters that implicated the student as a drug dealer. Strict notified the police who charged Jamie with possession of marijuana.

Although Jamie denies the marijuana or paraphenalia are even his/hers, he/she also contends that the vice principal had no right to search his/her book bag and, because the search was unconstitutional, the evidence should not be used against him/her. A book bag, according to Jamie, is a very private place—even in a school setting. If the school could invade the privacy of students for suspicion of violating the school's smoking policy, could they also then strip search a student suspected of chewing gum against school rules?

Vice Principal Strict contends that his/her primary responsibility as an administrator of a public school is to maintain a safe and healthy learning environment. The school must be willing to be pro-active in purging itself of drugs, alcohol, and weapons on school property. Years of experience, asserts Strict, help to inform his/her judgement about the appropriateness of any search. The important educational mission of the school justifies lowering the constitutional protections against unreasonable searches and seizures in schools as compared to other settings.

This is the constitutional question you must decide during the trial: did Vice Principal Strict violate Jamie's Fourth Amendment rights by conducting an illegal search? In deciding the case, you should apply the principles of *New Jersey v. T.L.O.* (1985). First, was the search justified at its inception? That is, there must be a "reasonable suspicion" that the search will discover evidence that the student "violated or is violating the law or school rules." Second, was the search "reasonably related in scope to the circumstances which justified interference in the first place?" The "scope" of the search must be based on the following criteria: (1) the procedures used in the search must be related to what the search is looking for; and (2) the procedures used must not be excessively intrusive, taking into account the student's age, sex, and the nature of the infraction.

Participants: *State v. Jamie L. Potter*

Judge:	J. White
Bailiff:	Pat L. Order
Defendant:	Jamie L. Potter, student, Privacy High School
Defense Counsel #1:	Kim Brandeis
Defense Counsel #2:	Sandy Brennan
Prosecution #1:	Shawn Scalia
Prosecution #2:	Tracy O'Connor
Witness for the Defense:	K. Hall, Law and History Professor, Minnesota State University
Witness for the Prosecution:	Jan Power-Tripp, Teacher, Privacy High School
Witness for the Prosecution:	I. M. Strict, Vice Principal, Privacy High School

The Trial Script: *State v. Jamie L. Potter*

Bailiff: (STAND) All rise. The Superior Court for the State of (name of state), is now in session. The Honorable J. White presiding.

Judge: (ENTER THE ROOM AND TAKE YOUR SEAT) Please be seated. This is the case of the State of (name of state) versus Jamie L. Potter which involves the charge that the defendant violated Criminal Code #35-28-4-11, possession of less than 30 grams of marijuana. Court is now in session. (STRIKE THE GAVEL) Is the prosecution ready?

Prosecution #1: (STAND) Yes, your Honor. (SIT DOWN)

Judge: Is the defense ready?

Defense #1: (STAND) Yes, your Honor. (SIT DOWN)

Judge: (LOOK AT THE PROSECUTION) Counsel, you may proceed with your opening argument.

Prosecution #1: (STAND, WALK AROUND THE TABLE AND LOOK AT THE JUDGE AND THE JURY) Your Honor, the state will prove beyond a reasonable doubt that the defendant, Mr./Ms. Jamie Potter violated criminal code #35-28-4-11 and by doing so is guilty of the charge of possession of less than 30 grams of marijuana. The state will show the following facts in this case. On the morning of November 27, 1997, Vice Principal Strict was informed by a teacher that a student, Jamie Potter, was smoking a cigarette in one of Privacy High School's restrooms. In the office, Vice Principal Strict asked Jamie Potter, if in fact he/she was smoking. Jamie Potter denied smoking in the restroom. Having a reasonable suspicion to conduct a search, Vice Principal Strict asked Jamie to hand over his/her book bag. In the book bag, Vice Principal Strict found cigarettes. Vice Principal Strict decided to look further into the book bag and found a plastic bag with a small amount of marijuana. He/she then called the state juvenile authorities. Upon their arrival, Jamie was read his/her rights and arrested for possession of marijuana.

Ladies and gentlemen of the jury, the state will rely on two witnesses to prove its case. Their testimony will suggest that Jamie Potter is guilty of the crime charged. You will hear from Mr./Ms. Jan Power-Tripp, the teacher who discovered the wrong doing and witnessed the search of Jamie's book bag in the vice principal's office. You will also hear from Vice Principal Strict, who will testify that he/she acted in a reasonable manner in conducting the search of Jamie Potter's book bag. From the evidence you are about to hear, you will have no choice but to find the defendant guilty of the crime charged. Thank you. (SIT DOWN)

Judge: Thank you. The court will now hear the defense's opening statement.

Defense #1: (STAND, WALK AROUND THE TABLE AND LOOK AT JURY) Your Honor, the Defense intends to show the following facts in this case. First of all, according to *New Jersey v. T.L.O.*, the inception of the search must be reasonable. In other words, there must be reasonable grounds for suspecting that the search will discover evidence that the student "violated or is violating the law or school rules." In this situation there is no reasonable suspicion. Secondly, after finding cigarettes in Jamie's book bag, Vice Principal Strict continued to search through the book bag. In this case, there were no reasonable grounds to begin a search and the search continued after the cigarettes were fou . Therefore, the action taken by the vice principal denied Jamie his/her Fourth Amendment right to be protected against unreasonable searches and seizures.

Ladies and Gentlemen of the jury, the search that the vice principal conducted was unconstitutional. The evidence gathered in the search should not be used to prove guilt in this case. In the important 1961 case of *Mapp v. Ohio*, the U.S. Supreme Court expanded the rights of the accused by demanding that evidence collected in an illegal manner be excluded from prosecutions. The "exclusionary rule" means that the evidence gathered in an unconstitutional manner should not be used against the accused. Through the testimony of Jamie Potter and Professor K. Hall, you will hear that Jamie's Fourth Amendment right to be protected against unreasonable searches and seizures has been denied. Jamie Potter should be found not guilty because the inception of the search was not based on a reasonable suspicion and the scope of the search was not reasonable because the search continued after the cigarettes were found. Therefore, the evidence being presented by the prosecution has been collected in an unconstitutional manner and cannot be used against Jamie. Thank you. (SIT DOWN)

Judge: Thank you. Will the prosecution please call its first witness.

Prosecution #1: (STAND) The state calls Mr./Ms. Jan Power-Tripp. (SIT DOWN)

Power-Tripp: (MOVE TO WITNESS STAND AND REMAIN STANDING)

Bailiff: (APPROACH WITNESS STAND) Raise your right hand, please. Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Power-Tripp: I do. (SIT DOWN)

Bailiff: (RETURN TO YOUR CHAIR)

Prosecution #1: (STAND AND APPROACH THE WITNESS) State your name for the court, please.

Power-Tripp: Jan Power-Tripp.

Prosecution #1: Where do you work, Mr./Ms. Power-Tripp?

Power-Tripp: I am a teacher at Privacy High School.

Prosecution #1: Were you at school on the morning of November 27, 1997?

Power-Tripp: Yes, I was.

Prosecution #1: Did anything unusual happen that day?

Power-Tripp: I should say so; I caught a drug dealer smoking cigarettes in the restroom.

Defense #1: (STAND) Objection, your Honor. The witness is expressing an opinion. (SIT DOWN)

Judge: Sustained. (LOOK AT THE JURY) Please disregard the witness's statement.

Prosecution #1: Mr./Mrs. Power-Tripp, please tell the jury what happened on the morning in question.

Power-Tripp: Just before first period was about to begin, I was walking past the restrooms as Jamie Potter and another student were coming out. I saw and smelled cigarette smoke coming from the restroom.

Prosecution #1: What happened then?

Power-Tripp: I accused Jamie of smoking cigarettes and asked him/her to follow me down to the vice principal's office.

Prosecution #1: What happened next?

Power-Tripp: Vice Principal Strict asked Jamie if he/she had been smoking.

Prosecution #1: How did Jamie respond?

Power-Tripp: Jamie lied and said he/she hadn't been smoking.

Defense #2: (STAND) Objection, your Honor. The witness is again expressing an opinion. (SIT DOWN)

Judge: Sustained. (TO THE WITNESS) Please refrain from opinionated responses.

Prosecution #1: What happened after that?

Power-Tripp: Vice Principal Strict asked Jamie to see his/her book bag.

Jamie: (STAND) That's a lie! Vice Principal Strict made me give him/her the book bag. (SIT DOWN)

Judge: (STRIKE THE GAVEL) Will the defendant please refrain from any outbursts in the courtroom. (TO THE PROSECUTION) Please continue.

Prosecution #1: What happened after Jamie gave the book bag to Vice Principal Strict?

Power-Tripp: Vice Principal Strict looked in the book bag and found a pack of cigarettes.

Prosecution #1: Why did Vice Principal Strict decide to look further into the book bag?

Power-Tripp: He/She is the vice principal. He/She has every right to look deeper into the book bag if he/she wants to. Besides, there was evidence to suggest that Jamie was breaking a school rule.

Prosecution #1: Did he/she find anything else?

Power-Tripp: Yes, Vice Principal Strict found a plastic bag with a small amount of marijuana.

Prosecution #1: (GIVE PROSECUTION'S EXHIBIT "A" TO BAILIFF FOR MARKING) Your Honor, I ask that this plastic bag containing marijuana be marked for identification as "prosecution's exhibit A."

Bailiff: (MARK WITH A LETTER "A" AND HAND BACK TO THE PROSECUTION)

Prosecution #1: (SHOW THE EVIDENCE TO THE WITNESS) Do you recognize this plastic bag which is marked "prosecution's exhibit A?"

Power-Tripp: Yes, I believe it is the plastic bag that Vice Principal Strict found in Jamie's book bag.

Prosecution #1: (PLACE THE EVIDENCE BACK ON YOUR TABLE) (LOOK AT JUDGE) Your honor, I offer this plastic bag for admission into evidence as "prosecution's exhibit A" and ask the Court to so admit it.

Judge: You may proceed.

Prosecution #1: Thank you, Mr./Ms. Power-Tripp. I have no further questions, your Honor. (LOOK AT THE DEFENSE) Your witness. (SIT DOWN)

Defense #1: (STAND AND APPROACH THE WITNESS) Mr./Ms. Power-Tripp, how long have you been a teacher?

Power-Tripp: This is my second year.

Defense #1: So you are not a very experienced teacher, are you?

Prosecution #1: (STAND) Objection, your Honor. This line of questioning is irrelevant to the case. (SIT DOWN)

Judge: Sustained. Please continue.

Defense #1: Wh... you believe Jamie when he/she denied smoking cigarettes in the restroom?

Power-Tripp: Y.. can't believe kids like Jamie. Believe me, I can tell when someone is lying.

Defense #1: Isn't it true that last year you got an award for confronting the most students for smoking on school grounds?

Power-Tripp: (VERY PROUD) Yes, that's true, I did get an award.

Defense #1: And isn't it true that more than half of those students denied smoking?

Power-Tripp: Yes, but you know how some kids are, they won't tell you the truth.

Defense #1: Mr./Ms. Power-Tripp, did you go into the restroom to see if any other students could have been smoking?

Power-Tripp: No, I really didn't need to.

Defense #1: Then, how can you be absolutely sure that Jamie was smoking cigarettes in the restroom?

Power-Tripp: Look, I know what I saw and smelled; it was reasonable for me to accuse Jamie. Therefore, it was reasonable for Vice Principal Strict to conduct the search.

Defense #1: Mr./Ms. Power-Tripp, don't you think it is possible that Vice Principal Strict violated Jamie's Fourth Amendment rights when he/she searched the book bag after the cigarettes were found?

Prosecution #1: Objection, your Honor. The counsel is leading the witness.

Judge: Sustained. Counsel, please continue.

Defense #1: Your Honor, I have no further questions. (SIT DOWN)

Judge: (LOOK AT THE WITNESS) You may step down. (LOOK AT THE PROSECUTION) Will the prosecution please call its next witness.

Prosecution #2: (STAND) The prosecution calls Vice Principal Strict to the stand. (SIT DOWN)

Strict: (MOVE TO THE WITNESS STAND AND REMAIN STANDING)

Bailiff: (APPROACH THE WITNESS STAND) Raise your right hand, please. Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Strict: I do. (SIT DOWN)

Bailiff: (RETURN TO YOUR SEAT)

Prosecution #2: (STAND AND APPROACH THE WITNESS) State your name for the court.

Strict: My name is I.M. Strict.

Prosecution #2: How long have you worked at Privacy High School?

Strict: I taught high school government for ten years and I have been the vice principal for the past five years.

Prosecution #2: Do you have a family?

Strict: Yes I do. I have been married for eight years, I have two children and I teach Sunday school at our local church.

Prosecution #2: What happened on the morning of November 27, 1997?

Strict: Just before first period, Mr./Ms. Power-Tripp came to my office with Jamie Potter.

Prosecution #2: Was there a problem?

Defense #1: (STAND) Objection, your Honor. The Prosecution is leading the witness. (SIT DOWN)

Judge: Sustained. Please re-phrase your question.

Prosecution #2: What happened next?

Strict: Mr./Ms. Power-Tripp explained to me that he/she suspected Jamie of smoking cigarettes in the restroom.

Prosecution #2: What did you do, then?

Strict: I asked Jamie if he/she had been smoking cigarettes in the restroom.

Prosecution #2: How did Jamie respond?

Strict: Jamie denied smoking in the restroom.

Prosecution #2: Is there a school policy that deals with cigarettes?

Strict: Yes, there is. It states that cigarette products are not allowed on school grounds.

Prosecution #2: What happened next?

Strict: I asked Jamie for his/her book bag.

Jamie: (STAND) That's a lie, you scared me into giving you the book bag! (SIT DOWN)

Judge: (POUND THE GAVEL) One more outburst like that young man/lady and I will have you removed from this courtroom.

Jamie: (STAND) I'm sorry, your Honor. (SIT DOWN)

Judge: (LOOK AT THE PROSECUTION) Please continue.

Prosecution #2: Did Jamie give you his/her book bag?

Strict: Yes, Jamie did.

Prosecution #2: What happened next?

Strict: I looked into the book bag and found cigarettes.

Prosecution #2: Did you stop searching the book bag at this point?

Strict: No, I did not.

Prosecution #2: Why, then, did you continue to search the book bag?

Strict: As I was taking the cigarettes out of the book bag, I remembered that I had recently spoken with a teacher who believed Jamie might be smoking more than just cigarettes. I thought it would be reasonable to continue the search. Who knows what you might find?

Prosecution #2: In other words, you had reasonable suspicion to believe that more cigarettes were in the book bag and maybe drugs too?

Defense #1: (STAND) Objection, your Honor. The Prosecution is leading the witness. (SIT DOWN)

Judge: Sustained, please re-phrase the question.

Prosecution #2: What did you discover in the more thorough search?

Strict: I did a complete search of the book bag and found a plastic bag containing a small amount of marijuana in a side pocket.

Prosecution #2: What did you do then?

Strict: I called the state juvenile authorities. They came to the school, read Jamie Potter his/her rights and arrested Jamie on the charge of possession of marijuana.

Prosecution #2: I have no further questions, your Honor. (LOOK AT THE DEFENSE) Your witness. (SIT DOWN)

Defense #2: (STAND AND APPROACH THE WITNESS) Vice Principal Strict, you testified that Jamie gave you the book bag after you asked for it. Is this not correct?

Strict: Yes, that is correct.

Defense #2: In your position as vice principal, isn't it possible for you to intimidate or scare students?

Strict: I'm not sure what you mean.

Defense #2: Wouldn't you say that you possess a certain amount of control over the students at Privacy High School?

Strict: I would say that an effective vice principal has to exert a certain amount of control over students to ensure discipline and a healthy learning environment.

Defense #2: Isn't seizing a book bag through intimidation kind of like getting a forced confession?

Strict: No, I wouldn't say so.

Defense #2: Do you honestly believe that there was enough evidence that suggested that Jamie was violating a school rule to begin a search of his/her book bag?

Strict: Yes, I do.

Defense #2: Vice Principal Strict, didn't you testify that after finding the cigarettes in Jamie's book bag you continued to search because you had a "suspicion" about Jamie?

Strict: Yes, that is true.

Defense #2: Vice Principal Strict, do you consider a book bag to be a student's private property? In other words, does a person have a reasonable expectation of privacy in his/her book bag?

Strict: Yes, I would say so.

Defense #2: Even though a student has an expectation of privacy, you went ahead and searched the book bag without reasonable suspicion?

Strict: No, no, I had reasonable suspicion. Besides I found drugs, doesn't that count for something?

Defense #2: Vice Principal Strict, the word of a teacher who thinks someone is smoking marijuana is not reasonable suspicion. It is more like the evidence the Nazis used to round up their victims. The ends do not justify the means. I have no further questions, your Honor. (SIT DOWN)

Judge: (LOOK AT THE WITNESS) You may step down. (LOOK AT THE PROSECUTION) Will the prosecution call its next witness.

Prosecution #2: (STAND) Your Honor, the state rests. (SIT DOWN)

Judge: (LOOK AT THE DEFENSE) Will the defense call its first witness.

Defense #1: (STAND) The defense calls Professor K. Hall to the stand. (SIT DOWN)

Hall: (MOVE TO THE WITNESS STAND AND REMAIN STANDING)

Bailiff: (APPROACH WITNESS) Raise your right hand, please. Do you swear or affirm that the testimony that you are about to give is the truth, the whole truth, and nothing but the truth?

Hall: I do. (SIT DOWN)

Bailiff: (TAKE YOUR SEAT)

Defense #1: (STAND AND APPROACH THE WITNESS) State your name for the Court.

Hall: Professor K. Hall.

Defense #1: Professor Hall, where do you work?

Hall: I am a professor of law and history at Minnesota State University.

Defense #1: How long have you worked there?

Hall: I have taught law and history for the past 20 years.

Defense #1: Are you familiar with the exclusionary rule and the Fourth Amendment's protection against unreasonable searches and seizures?

Hall: Yes, I am. One of the courses I teach covers this topic. In addition, I have written several books and articles dealing with the Fourth Amendment.

Defense #1: Professor Hall, can you explain the exclusionary rule?

Hall: In 1914 the exclusionary rule was justified by the U.S. Supreme Court for two major reasons. First, the fruit of a poisoned tree is as poisonous as the tree itself. That is, evidence resulting from illegal activity is, like the activity, stained with illegality and injustice. And second, if the courts base decisions on this "ill-gotten gain," they have participated in the illegality, and their decisions are unjust.

Defense #1: What about searches and seizures?

Hall: In order to obtain a search warrant from a judge, a police officer needs probable cause that a wrong has been committed and the warrant must be very specific.

Defense #1: Have there been cases where evidence was ruled out because of how the search was carried out?

Hall: Oh, yes. In 1961, the U.S. Supreme Court overturned the conviction of Ms. Mapp, who was found guilty of possessing pornographic materials, because the police search of her house was found to be illegal.

Defense #1: In your expert opinion, did Vice Principal Strict have reasonable suspicion to begin a search of Jamie's book bag and continue to search after the cigarettes were found?

Prosecution #2: (STAND) Objection, your Honor. Defense is asking the witness to express an opinion. (SIT DOWN)

Defense #1: Your Honor, I believe that I have established that Professor Hall is an expert concerning constitutional issues, therefore he/she should be allowed to answer the question.

Judge: Overruled. (TO THE WITNESS) You may answer the question.

Hall: No, I do not. I believe people have an expectation of privacy, especially when privacy involves something like a personal book bag.

Defense #1: Professor Hall, what is the difference between probable cause and reasonable suspicion?

Hall: In 1985, the U.S. Supreme Court decided the case of *New Jersey v. T.L.O.* In that case the Court argued that a principal of a school does not need probable cause to search a person's belongings; rather, the principal needs only reasonable suspicion to conduct a search. And the search must pass a two-pronged test that suggests that the inception and the scope of the search are reasonable.

Defense #1: Based on what you have just told the court, would you agree that the search of defendant Jamie Potter's book bag was based on a reasonable suspicion?

Prosecution #2: (STAND) Objection, your Honor, counsel is leading the witness. (SIT DOWN)

Judge: Sustained. Please re-phrase your question.

Defense #1: In your expert opinion, was the search of Jamie's book bag based on reasonable suspicion?

Hall: I believe the search was questionable, therefore the evidence gathered by the search should be excluded and should not be considered in any decision made by this court.

Defense #1: Did Vice Principal Strict deny Jamie his/her Fourth Amendment rights to be protected against unreasonable searches and seizures?

Hall: Yes, I believe that Vice Principal Strict did not have a reasonable suspicion to begin or continue the search, therefore Jamie's Fourth Amendment rights were denied.

Defense #1: No further questions, your Honor. (LOOK AT THE PROSECUTION) Your witness. (SIT DOWN)

Prosecution #1: (STAND AND APPROACH THE WITNESS) Professor Hall, you testified that there is a difference between probable cause and reasonable suspicion, did you not?

Hall: Yes, I did.

Prosecution #1: Isn't it true that having "reasonable suspicion" requires less certainty than "probable cause?"

Hall: It is certainly less, but I do not know how much less.

Prosecution #1: Isn't it true that a school official generally does not need a search warrant to search a student's belongings?

Hall: Yes, it is true.

Prosecution #1: Professor Hall, you testified that you believed that Vice Principal Strict denied Jamie his/her Fourth Amendment rights by continuing to search the book bag, did you not?

Hall: Yes, I did.

Prosecution #1: Isn't it true that in 1986, Retired Chief Justice Warren Burger, writing the majority opinion in *Bethel School District v. Fraser*, suggested that students in school settings do not automatically have the same rights as adults?

Hall: Yes, you are correct.

Prosecution #1: Then, isn't it possible that Vice Principal Strict did not deny Jamie Fourth Amendment rights because the search took place in a school and was conducted with reasonable suspicion?

Hall: I guess it is possible.

Prosecution #1: I have no further questions, your Honor. (SIT DOWN)

Judge: (TO THE WITNESS) You may step down. (LOOK AT THE DEFENSE) Counsel, you may call your next witness.

Hall: (RETURN TO YOUR CHAIR)

Defense #2: (STAND) Your Honor, the defense calls the defendant, Jamie L. Potter, to the stand. (SIT DOWN)

Jamie: (MOVE TO THE WITNESS STAND AND REMAIN STANDING)

Bailiff: (APPROACH THE WITNESS) Raise your right hand, please. Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Jamie: I do. (SIT DOWN)

Bailiff: (RETURN TO YOUR CHAIR)

Defense #2: (STAND AND APPROACH THE WITNESS) State your name for the Court.

Jamie: My name is Jamie L. Potter.

Defense #2: Jamie, where do you go to school?

Jamie: I am a junior at Privacy High School.

Defense #2: Tell us about the morning of November 27, 1997.

Jamie: Well, I was getting ready to go to my first hour class. As I was leaving the restroom, Mr./Ms. Power-Tripp stopped me and accused me of smoking cigarettes in the restroom. I told him/her I wasn't smoking, but he/she did not believe me because he/she smelled smoke, so I . . . .

Prosecution #1: (STAND) Objection, your Honor. The witness is giving us a narrative. (SIT DOWN)

Judge: (TO THE WITNESS) Please keep your answers brief and to the point. (TO THE DEFENSE) Counsel, please ask the witness more specific questions.

Defense #2: Jamie, what happened after Mr./Ms. Power-Tripp told you he/she did not believe you?

Jamie: I told Mr./Ms. Power-Tripp that the restroom always smells like cigarette smoke.

Defense #2: What did Mr./Ms. Power-Tripp say?

Prosecution #1: (STAND) Objection, your Honor. The question is asking for hearsay. (SIT DOWN)

Judge: Sustained, counsel please re-phrase your question.

Defense #2: What happened next?

Jamie: Mr./Ms. Power-Tripp took me down to the vice principal's office anyway.

Defense #2: What happened in the vice principal's office?

Jamie: Vice Principal Strict told me to give him/her my book bag.

Defense #2: Did Vice Principal Strict ask you if he/she could look into your book bag?

Jamie: No he/she did not. He/she opened the book bag and began to look through it.

Defense #2: Did the vice principal find anything?

Jamie: Yes, he/she found cigarettes, but I wasn't smoking them in school.

Defense #2: What happened next?

Jamie: For no reason, Vice Principal Strict continued to search my book bag.

Defense #2: Jamie, do you ever carry any personal items in your book bag?

Jamie: All the time. I carry important phone numbers, notes from friends, and other personal things. I don't expect people to look inside. It's private!

Defense #2: Your Honor, I ask that this book bag be marked for identification as "defense's exhibit A". (HAND THE BOOK BAG TO THE BAILIFF FOR MARKING)

Bailiff: (MARK THE BOOK BAG WITH AN "A" AND HAND THE BOOK BAG BACK TO THE DEFENSE)

Defense #2: (SHOW THE BOOK BAG TO THE WITNESS) Jamie, do you recognize this book bag which is marked as "defense's exhibit A"?

Jamie: Yes, it is mine.

Defense #2: Your Honor, I offer this book bag for admission into evidence as "defense's exhibit A" and ask the Court to so admit it.

Judge: You may proceed.

Defense #2: Show the Court where Vice Principal Strict found the cigarettes.

Jamie: Vice Principal Strict opened the book bag. (SHOW THE JURY) The cigarettes were right on top.

Defense #2: Jamie, are you aware that Vice Principal Strict also found a small amount of marijuana in your book bag?

Jamie: Yes, but I don't know how it got there.

Prosecution #2: That's a lie.

Judge: (HIT THE GAVEL) One more outburst like that counsel and I will find you in contempt.

Defense #2: Show the court where Vice Principal Strict found the marijuana in your book bag.

Jamie: He/she found the marijuana in a side pocket.

Defense #2: You mean that Vice Principal Strict searched all through your book bag and then searched in a side pocket too.

Prosecution #1: (STAND) Objection, your Honor. Counsel is leading the witness. (SIT DOWN)

Judge: Sustained. Please re-phrase your question.

Defense #2: No further questions, your Honor. (TO THE PROSECUTION) Your witness. (SIT DOWN)

Prosecution #2: (STAND AND APPROACH THE WITNESS) Jamie, you testified that you don't know how the marijuana got in your book bag. Is that true?

Jamie: Yes, I don't know.

Prosecution #2: It seems pretty unlikely that the marijuana just appeared in your book bag. How do you explain it being there?

Jamie: I can't. I guess someone put it in the pocket of my book bag when I was in the restroom.

Prosecution #2: That seems highly unlikely.

Jamie: I don't know, I tell you! But one thing I know, it's not mine!

Prosecution #2: Jamie, do you think it is the vice principal's job to make sure that students are following school rules?

Jamie: Yes, it is part of the job.

Prosecution #2: And do you think it is part of the job of the vice principal to ensure that Privacy High School is drug-free?

Jamie: I guess so.

Prosecution #2: Don't you think it was reasonable for Vice Principal Strict to search your book bag, especially when you understand his/her job responsibilities?

Jamie: No, I do not. Mr./Ms. Strict did not have reasonable suspicion, therefore he/she should not have searched through my book bag. I wasn't smoking cigarettes and the marijuana is not mine.

Prosecution #2: I have no further questions, your Honor. (SIT DOWN)

Judge: (TO THE WITNESS) You may step down. (TO THE DEFENSE) Will the defense call its next witness.

Defense #1: (STAND) The defense rests, your Honor. (SIT DOWN)

Judge: (LOOK AT THE PROSECUTION) Does the prosecution wish to make a closing argument?

Prosecution #2: (STAND) We do, your Honor.

Judge: You may proceed.

Prosecution #2: (APPROACH THE JURY) Ladies and gentlemen of the jury, I want to thank you for being so patient during this very important trial. The state has proven beyond a reasonable doubt that the defendant, Jamie L. Potter, is guilty of violating Criminal Code #35-28-4-11, possession of less than 30 grams of marijuana. Through the testimony of Jan Power-Tripp, a teacher at Privacy High School, you have heard how he/she discovered Jamie smoking in a school restroom. You have heard how Mr./Ms. Power-Tripp escorted Jamie to the vice principal's office where Vice Principal Strict searched Jamie's book bag, having a reasonable suspicion to do so. From the testimony of Vice Principal Strict, you have heard how he/she not only found cigarettes, but also found a small amount of marijuana inside Jamie's book bag. Vice Principal Strict did not violate Jamie's Fourth Amendment right to be protected from unreasonable searches and seizures because the search was reasonable. In public schools, students' rights are limited because of the school's responsibility to promote an orderly learning environment.

Ladies and gentlemen, the state again thanks you for your civic participation and asks that you return a verdict of guilty. (SIT DOWN).

Judge: (LOOK AT THE DEFENSE) Does the defense wish to make a closing argument?

Defense #2: (STAND) We do, your Honor.

Judge: You may proceed.

Defense #2: (APPROACH THE JURY) Ladies and gentlemen of the jury, the defense would also like to thank you for your time and patience today. I agree with the prosecution on one point. This is an important trial. It is important because a citizen's right to be protected against unreasonable searches and seizures is a fundamental part of our Bill of Rights. It is the protection that ordinary people have against intrusions from the state. From the testimony of Professor K. Hall, you heard how evidence that is gathered without a reasonable suspicion should not be used to prove guilt. The search of Jamie's book bag was highly questionable because the inception and scope of the search were unreasonable. People living in a free society have an expectation of privacy when it comes to personal items like book bags. From the testimony of Jamie Potter, you heard how the search was conducted and that Jamie denies both smoking in the restroom and possession of marijuana. The evidence gathered in this case was gathered illegally.

Ladies and gentlemen, there is reasonable doubt that Jamie is guilty of the charge brought by the State. In addition, Jamie's Fourth Amendment right to be protected from unreasonable searches and seizures has been violated. I ask that you find the defendant, Jamie Potter not guilty. Thank you. (SIT DOWN)

Judge: (LOOK AT THE JURY) You have heard the evidence in this case. It is now your job to decide whether the defendant, Jamie L. Potter, is guilty of possession of marijuana. Let me remind you that if you believe the reasons to begin a search or the scope of the search of Jamie's book bag were unreasonable, then you may find the defendant not guilty, even if you believe the marijuana was Jamie's. However, if you believe the search was reasonable in its inception and scope and that the marijuana was Jamie's, then you must find the defendant guilty. Please go with the Bailiff to the jury room and make your decision. When you have decided a unanimous verdict, please return to the courtroom and inform the court.

Bailiff: All rise. (LEAD JURY TO JURY ROOM)

Jury: (FOLLOW THE BAILIFF TO THE JURY ROOM)

Judge: (AFTER JURY HAS LEFT) Please, be seated.

AFTER THE JURY IS READY TO DELIVER ITS VERDICT

Bailiff: (STAND) All rise.

Judge: Please be seated. (LOOK AT JURY) Have you reached a verdict?

Head Juror: (STAND) Yes, your Honor.

Judge: Please read the verdict.

Head Juror: We find the defendant Jamie L. Potter, **GUILTY/NOT GUILTY.**

Judge: This Court is adjourned. (STRIKE THE GAVEL)

Instructions for the Jury: *State v. Jamie L. Potter*

In this case, you have to decide whether or not Jamie L. Potter is guilty of the charge of possession of marijuana. To decide this question, however, you must decide whether or not the search of Jamie's book bag violated the Fourth Amendment.

QUESTIONS TO CONSIDER: In order to determine the guilt or innocence of Jamie, please consider the following questions.

1) Do you believe the search, at its inception, was based on reasonable suspicion?
__ Yes __ No

2) Do you believe that the scope of the search was reasonable?
__ Yes __ No

3) Do you believe the marijuana belonged to Jamie?
__ Yes __ No

If you answered:
YES to all three questions, you should find the defendant, Jamie Potter, GUILTY.

	Yes	No
Question 1	X	
Question 2	X	
Question 3	X	

NO to #1 and #2, you should find the defendant, Jamie Potter, NOT GUILTY.

	Yes	No
Question 1		X
Question 2		X

YES to #1 and NO to #3, you should find the defendant, Jamie Potter, NOT GUILTY.

	Yes	No
Question 1	X	
Question 3		X

NO to #1 and yes to #3, you should find the defendant, Jamie Potter, NOT GUILTY.

	Yes	No
Question 1		X
Question 3	X	

Relevant U. S. Supreme Court Decisions

Key Holdings from the Supreme Court Decision

The case of *State v. Jamie L. Potter* is based upon the U.S. Supreme Court case, *New Jersey v. T.L.O.* (1985). An abstract of that case, taken directly from the Court's decision, is presented below. Do you agree or disagree with the Court's decision in *T.L.O.*? How does your decision compare with the Supreme Court's?

New Jersey v. T. L. O.
469 U.S. 325
Argued: March 28, 1984
Reargued: October 2, 1984
Decided: January 15, 1985

The Facts of the Case:

A teacher at a New Jersey high school, upon discovering respondent, then a 14-year-old freshman (T.L.O.), and her companion smoking cigarettes in a school lavatory in violation of a school rule, took them to the principal's office, where they met with the assistant vice principal. When respondent, in response to the assistant vice principal's questioning, denied that she had been smoking and claimed that she did not smoke at all, the assistant vice principal demanded to see her purse. Upon opening the purse, he found a pack of cigarettes and also noticed a package of cigarette rolling papers that are commonly associated with the use of marijuana. He then proceeded to search the purse thoroughly and found some marijuana, a pipe, plastic bags, a fairly substantial amount of money, an index card containing a list of students who owed respondent money, and two letters that implicated her in marijuana dealing. Thereafter, the state brought delinquency charges against respondent in the Juvenile Court, which, after denying respondent's motion to suppress the evidence found in her purse, held that the Fourth Amendment applied to searches by school officials but that the search in question was a reasonable one, and adjudged respondent to be a delinquent. The Appellate Division of the New Jersey Superior Court affirmed the trial court's finding that there had been no Fourth Amendment violation but vacated the adjudication of delinquency and remanded on other grounds. The New Jersey Supreme Court reversed and ordered the suppression of the evidence found in respondent's purse, holding that the search of the purse was unreasonable. But the U.S. Supreme Court reversed this decision.

Key Holdings:

1. The Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials and is not limited to searches carried out by law enforcement officers. Nor are school officials exempt from the Amendment's dictates by virtue of the special nature of their authority over schoolchildren. In carrying out searches and other functions pursuant to disciplinary policies mandated by state statutes, school officials act as representatives of the state, not merely as surrogates for the parents of students, and they cannot claim the parents' immunity from the Fourth Amendment's strictures.

2. School children have legitimate expectations of privacy. They may find it necessary to carry with them a variety of legitimate, non-contraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items by bringing them onto school grounds. But striking the balance between schoolchildren's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place requires some easing of the restrictions to which searches by public authorities are ordinarily subjected. Thus, school officials need not obtain a warrant before searching a student who is under their authority. Moreover, school officials need not be held subject to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the rea-

sonableness of any search involves a determination of whether the search was justified at its inception and whether, as conducted, it was reasonably related in scope to the circumstances that justified the interference in the first place. Under ordinary circumstances the search of a student by a school official will be justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. And such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the student's age and sex and the nature of the infraction.

3. Under the above standard, the search in this case was not unreasonable for Fourth Amendment purposes. First, the initial search for cigarettes was reasonable. The report to the assistant vice principal that respondent had been smoking warranted a reasonable suspicion that she had cigarettes in her purse, and thus the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation of the no-smoking rule. Second, the discovery of the rolling papers then gave rise to a reasonable suspicion that respondent was carrying marijuana as well as cigarettes in her purse, and this suspicion justified the further exploration that turned up more evidence of drug-related activities.

The decision of the New Jersey Supreme Court is reversed.

Dissenting Opinion, Justice Brennan:

"The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court's decision today is a curious moral for the Nation's youth. Although the search of T. L. O.'s purse does not trouble today's majority, I submit that we are not dealing with 'matters relatively trivial to the welfare of the Nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.'" (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 1943.)

Recent and Related United States Supreme Court Cases

Chandler v. Miller
Argued: January 14, 1997
Decided: April 15, 1997

The Facts of the Case:

All candidates for elected state office, under a Georgia statute, must pass a urinalysis drug test within 30 days prior to their election or nomination. On behalf of several state office nominees from the Libertarian Party, Miller challenged the statute's constitutionality, naming Georgia's governor and other state officials as defendants. Miller claimed that Georgia's drug testing statute violate the Fourth Amendment's guarantee against illegal search and seizures.

The Decision:

In an 8-to-1 opinion, the Court noted that although the Fourth Amendment generally prohibits officials from conducting searches and seizures without individualized suspicion, there does exist a narrowly defined category of permissible suspicionless searches and seizures (e.g., jobs that, if conducted when impaired, could affect the safety and welfare of others). The Court held, however, that Georgia's requirement did not fit this category. Georgia failed to show why attempting to avoid drug users in political offices should outweigh candidates' privacy interests. The Court concluded that even if such a drug problem did exist among elected officials, the affected officials would most likely not perform the kind of high-risk, safety sensitive tasks, which might justify the statute's proposed incursion on their individual privacy rights.

Maryland v. Wilson
Argued: December 11, 1996
Decided: February 19, 1997

The Facts of the Case:

Wilson, a passenger in a car that was pulled over for speeding, was ordered by a Maryland state trooper to exit the car. As he got out of the car, a quantity of cocaine fell on the ground. Wilson was then arrested for possession with intent to distribute. Wilson challenged how the evidence against him was obtained. Did the trooper, by ordering a mere passenger in a car to step out, violate the Fourth Amendment's search and seizure guarantees?

The Decision:

The Court held that after lawfully stopping a speeding vehicle, an officer may order its passengers to step out. While burdening their personal liberty somewhat, officers must be permitted such authority over passengers if the overriding government's interest in officer safety is to be protected.

Vernonia School District v. Acton
Argued: March 28, 1995
Decided: June 26, 1995

The Facts of the Case:

There was reason to believe, after an official investigation, that high school athletes in the Vernonia School District (Oregon) participated in illegal drug use. School officials were concerned, among other issues, that drug use increased the risk of sports-related injury. As a result, the district adopted the Student Athlete Drug Policy that authorized the random urinalysis testing of student athletes. James Acton, a student, was not allowed to play football after he and his parents refused to consent to the testing. Acton claimed the school's policy of random drug testing of high school athletes violated the reasonable search and seizure clause of the Fourth Amendment.

The Decision:

The reasonableness of a search is judged by "balancing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests." High school athletes who are under state supervision during school hours are subject to greater control than adults in other settings. Since the conditions of collection are similar to public restrooms and the results are viewed only by limited authorities, the privacy interests compromised by collecting urinalysis samples are negligible. The governmental concern over the safety of minors under their supervision overrides the minimal intrusion in student-athletes' privacy.

California v. Greenwood
486 U.S. 35
Argued: January 11, 1988
Decided: May 16, 1988

The Facts of the Case:

Billy Greenwood was suspected of dealing drugs from his home. The police did not have enough evidence to obtain a warrant to search his home. Instead, they searched the garbage bags Greenwood had left by the curb for pickup. After searching Greenwood's garbage, police uncovered evidence of drug use, which was then used to obtain a warrant to search the house. The search of Greenwood's house yielded illegal substances. Greenwood was subsequently arrested on felony charges. Greenwood claimed the warrantless search and seizure of his garbage violated the Fourth Amendment's search and seizure guarantee.

The Decision:

In a 6-to-2 decision, the Court held that garbage placed at the curbside is unprotected by the Fourth Amendment. The Court contended that there was no reasonable expectation of privacy for trash on public streets "readily accessible to animals, children, scavengers, snoops, and other members of the public." In addition, the Court noted that the police cannot be expected to ignore criminal activity that can be observed by "any member of the public."

CHAPTER THREE
Freedom of Expression

Congress shall make no law. . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

—Amendment One, United States Constitution

The trial of *Chris Kritical v. Principal Watchermouth* raises several important constitutional issues. Among other issues, you are asked to decide whether or not Principal Watchermouth violated Chris Kritical's right to freedom of speech as protected by the First Amendment. These introductory materials will help you to frame, debate, and ultimately decide this important and controversial question.

The Idea of Freedom of Expression

The Bill of Rights contains numerous protections for the maintenance of a free society, but none more important than the freedom of expression.[1] For the past two hundred years, Americans have tried to balance the individual's right to freely express ideas with the community's need for safety, security, and stability. Where does one draw the line that separates protected speech from speech that "is sufficiently dangerous to the public welfare to constitutionally justify its limitation?"[2] Being a citizen in a democracy demands the responsibility of deciding when, how, or if at all, the government should limit an individual's right to freedom of expression. This section provides you with a brief historical account of freedom of expression that will help you better understand the issues presented in *Chris Kritical v. Principal Watchermouth* as well as inform your own judgment about this fundamental right.

For much of the world's history, various governments have used their powers to suppress certain kinds of expression—particularly when it was critical of the government or its policies. Because governments collect taxes and make certain other demands on their subjects or citizens (e.g., military service), it was, and in some countries still is, viewed as imperative that popular opinion be supportive of the government for its survival. Speech contrary to the government, then, was suppressed by various means. Two common means for controlling "dangerous speech" in England prior to the 19th century, for example, were the doctrine of seditious libel and the licensing and regulation of the press.[3]

Any publication that was critical of the King or his agents was considered seditious libel. The King was thought to be above criticism from his subjects. Truth was no defense for those who dared to publish ideas antithetical to the King's; a guilty verdict hinged only upon whether or not a document critical of the King was published.

Until 1694, the British also employed an elaborate system of licensing of documents for publication, which allowed government officials the power of prior restraint.[4] Thus, if a publication was overly critical of the government or its policies, the publisher would be denied a license and unable to legally print.

In the American colonies, although licensing and prior restraint were relatively rare, the threat of prosecution after publication through the doctrine of seditious libel (i.e., written language critical of the government or its leaders) was not. The trial of publisher John Peter Zenger is one famous example. In 1735 New York's Royal Governor, William Cosby, brought suit against Zenger for publishing articles critical of his policies. Because the King and his Governor's policies were already deeply resented in New York, Zenger's attorney, Andrew Hamilton, urged the jury to recognize the truth as a defense of his client. Hamilton asserted a right for the press to publish articles that were in accord with popular opinion. Although the Court rejected Hamilton's arguments, he did persuade the jury to acquit Zenger.

Sir William Blackstone in his *Commentaries on the Laws of England*, captured the attitude of many people in the colonies toward freedom of expression:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[5]

The freedom to speak critically of the government may have been cherished in the abstract, but was not always well-received in practice. Colonial legislatures routinely honored free speech when it agreed with their political views, but dishonored free speech when it was contrary to their views. From 1776-1789, no state removed the common law concept of seditious libel or adopted truth as a defense from its prosecution.[6] In addition, although most states in their new constitutions protected freedom of the press, only Pennsylvania's state constitution protected freedom of speech. In all other states before the ratification of the Bill of Rights, freedom of speech was granted only to members of the state legislature. Throughout the colonial period and until the ratification of the Bill of Rights, many Americans continued to believe "the security of the state against any libelous advocacy or attack outweighed any social interest."[7]

The Alien and Sedition Acts of 1798 provided an opportunity to crystallize the theory of freedom of expression as protected by the First Amendment.[8] The Alien Act empowered the President to order all aliens that he deemed dangerous to leave the country.[9] The Sedition Act prohibited "publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of Congress. . . or the President. . . with intent to defame. . . or to bring them. . . into contempt or disrepute . . . ." A jury had the right to determine both law and fact under the direction of the court and truth could be used as a defense during prosecution. Although the Acts were never challenged in the Supreme Court, the sentiment that both Acts were clear violations of the central meaning of the freedom of expression as embodied by the First Amendment "carried the day in the Court of history."[10] In a free society, the government cannot use its powers to silence or chill the speech of its critics.

The freedom to openly express ideas contrary to the government's or other citizens is now considered one of the most fundamental aspects of a free society.[11] John Stuart Mill recognized in his 1859 essay *On Liberty*, that the free exchange of ideas results in a more enlightened public.[12] In addition, freedom of expression has been recognized as an important component of self-fulfillment by enhancing every individual's opportunity to contribute to the social welfare.

It is not by accident that the Eastern European Communists suppressed not only political, but also artistic and religious forms of expression. Allowing these forms of expression and the free and open exchange of ideas was viewed as a threat to the survival of communist regimes. However, it was precisely this kind of freedom that the people of Eastern Europe demanded as they began overturning Communist rule in 1989. During this transition, freedom of expression has been held up as one of the premier rights of a free people.

Judicial Interpretation

The concept of freedom of expression in the United States continues to evolve. The courts, and more specifically, the Supreme Court, have helped to provide more meaning to the kinds of expression that deserve protection through the First Amendment as it is applied to specific cases and controversies. A brief history of how the Supreme Court has interpreted and applied the concept of freedom of expression should help you to more precisely frame and debate the issues in the *Kritical* case and help you decide its constitutional questions.

A history of the Supreme Court's interpretation of freedom of expression begins in the 20th century. The Court did not hear any free speech or free press cases until Congress passed the Espionage Act (1917) in response to World War I. During times of war, the Act made certain kinds of speech, especially speech that was critical of the United States or its war efforts, criminal offenses. *Schenck v. United States* (1919) and *Abrams v. United States* (1919) were the first opportunities for the Court to apply the principles of free expression to the Espionage Act of 1917.[13]

While Court upheld the Espionage Act in both cases, it also began to develop principles that would be used in subsequent free expression cases. Justice Oliver Wendell Holmes, Jr., writing for a unanimous Supreme Court in *Schenck*, asserted:

> *We admit that in many places and ordinary times the defendants. . .would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . .The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. . . .The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. . . .If the act (speaking or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. . . .*[14]

The right to free expression, according to the Holmes majority in *Schenck*, was not absolute; depending on the time, place, and manner of speech, governments could limit certain kinds of expression. The concept of free expression required the Court to analyze the circumstances of a particular case and balance the individual's right to free expression with the interests of the state in maintaining a stable and well-ordered society. Speech that created a "clear and present danger" (e.g., shouting "fire" in a crowded theater) could be limited.

Justice Holmes disagreed with the majority, however, in the *Abrams* case less than a year later. Although the Court again upheld convictions under the Espionage Act, Justice Holmes dissented on the grounds that the government could not constitutionally limit speech solely on the grounds that it had a tendency or the possibility of producing bad results. Rather, the government could only constitutionally justify limiting speech when there was an immediate and direct connection between the speech and illegal behavior.[15]

Other judges on the Supreme Court, never in the majority, have interpreted the First Amendment in absolutist terms that do not require the Court to balance the interests of the state with the interests of the individual. Justice Hugo Black, for example, declared in a dissent in *Konigsberg v. State Bar of California* (1961):

> *I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field. . . .I fear that the creation of "tests" by which speech is left unprotected under certain circumstances is a standing invitation to abridge it.*[16]

Not until *Gitlow v. New York* (1925) did the Court say that rights to freedom of expression in the First Amendment could be applied to individuals in their relationships with state governments.[17] Gitlow, a socialist who distributed literature advocating the establishment of socialism, was convicted under a New York criminal anarchy law which made it unlawful to advocate the overthrow of the government by force. Among other things, Gitlow argued that his pamphlet had not produced any action; there had not been any actual movement toward overthrowing the government. The Supreme Court had to decide: (1) if the protections for speech and press included in the First Amendment applied to the states; and, if they did, (2) did the New York law unconstitutionally interfere with Gitlow's First Amendment rights to free speech and press. The Court reasoned that the "liberty" protected by the due process clause of the Fourteenth Amendment embraced the concept of freedom of expression contained in the First Amendment in answering "yes" to question one.[18] In answering the second question, the Court employed the "dangerous tendency" test. In upholding the New York law, the Court declared that states did not need to show a "clear and present danger" to restrict speech; rather, the legislature may decide an entire class of speech is so dangerous that it should be prohibited.[19]

Brandenburg v. Ohio (1969) ushered in the "modern standard" for freedom of expression cases.[20] Brandenburg delivered a speech at a Ku Klux Klan meeting and was subsequently arrested under an Ohio law that made it "legal to advocate "crime sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." Did the Ohio law restricting speech that advocates various kinds of illegal activities violate Brandenburg's rights? The Court employed a two prong test that both state and federal statutes must meet to proscribe speech. Speech advocating the use of force or criminal activity could only be prohibited when the advocacy is (1) "directed to inciting or producing imminent lawless action" and (2) "likely to produce such action." The new test incorporates both the "clear and present danger" doctrine with the requirement that speech must be *intended* to produce an unlawful response.

Both on the state and federal levels, the Supreme Court has ruled against (1) prior restraints on speech;[21] (2) charges of seditious libel by government officials;[22] (3) acts of government designed to restrict unpopular ideas;[23] and (4) providing protection for obscene or lewd speech.[24] The debate on the limits of free speech continues today, whether it be embodied in obscene or inflammatory music lyrics or in burning the American flag. What about freedom of expression in school settings?

Free Expression in the Public Schools

Because of the important function of education in a democratic society, the Supreme Court has historically treated freedom of expression in school settings with special consideration. Protection for students' rights to free expression need to be balanced with the state's interest in creating and maintaining a safe and healthy learning environment. In 1940, the Court was asked to decide whether a school board could force a student (in this case a member of a minority religious denomination, Jehovah's Witness) to salute the American flag. The student and his family claimed that their religious doctrine forbade them to "worship graven images." They believed that saluting the American flag was equivalent to worshipping a graven image. So they refused to do so.

Justice Felix Frankfurter, writing in *Minersville School District v. Gobitis* (1940), argued that the case involved educational and not constitutional questions.[25] Therefore, if the Court were to intervene, it "would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it."[26] After the Court's decision, which in essence ruled that students had no constitutional right to refuse to salute the American flag in school, acts of violence were carried out against hundreds of Jehovah's Witnesses whose patriotism seemed to be in question.

However, only three years later, the Court overturned the *Gobitis* decision. In the case of *West Virginia State Board of Education v. Barnette* (1943), the Court reversed itself by declaring that students of the Jehovah Witness religion cannot be forced to salute the American flag.[27] Justice Robert Jackson argued that because schools "are educating the young for citizenship, they must be especially careful about upholding fundamental freedoms," such as the free exercise of religion and other forms of free expression of ideas and beliefs.

Twenty-five years later, the landmark case of *Tinker v. Des Moines School District* (1969), created the standard by which "personal student expression" in school settings would be judged.[28] Students in the Des Moines (Iowa) public schools were suspended for wearing black arm bands to protest the Vietnam War; this was declared a violation of school policy. The Court held that school administrators could only censor student speech that is "materially and substantially disruptive" or speech that invades the right of other students.[29] The Court, in a 7-to-2 decision, declared that students have the right to engage in peaceful nondisruptive protest, recognizing that the First Amendment guarantee of freedom of speech protects symbolic as well as oral speech. In addition, the Court acknowledged that students "do not shed their constitutional rights of freedom of speech or expression at the schoolhouse gate."[30]

During the 1980s two important decisions were made by the Supreme Court involving expression in the public schools. In the first, *Bethel School District No. 403 v. Fraser* (1986), the Court upheld the suspension of a high school student who, while delivering a speech on behalf of a student government candidate at a school assembly, made sexually suggestive statements:

> *I know a man who is firm. He's firm in his pants; he's firm in his shirt; his character is firm but most of all, his belief in you, the students of Bethel High, is firm. Jack Madison is a man who takes his point and pounds it in. If necessary, he'll*

take an issue and nail it to the wall. He doesn't attack things in spurts. He drives hard, pushing and pushing until finally he succeeds. Jack is a man who will go to the very end, even the climax, for each and everyone of you. So vote for Jack for vice president. He'll never come between you and the best our high school can be.[31]

In *Bethel* the Court held that school officials have the authority to determine what kind of speech "invades the rights of others" or interferes with the educational process.[32] Unlike *Tinker*, the Court decided that the Fraser's speech was not "political" in nature and therefore was not protected to the same level by the First Amendment.

Another important freedom of expression case during the 1980s involved a high school journalism class that produced a newspaper entitled *Spectrum*. In *Hazelwood School District v. Kuhlmeier* (1988), the Court held that public school authorities may censor student speech that takes place in school-sponsored forums.[33] In this case, the principal had practiced prior restraint by not allowing articles about teen pregnancy and the effect of divorce on students to be printed in *Spectrum*, a school publication. As long as school officials' reasons for their restrictions on student speech are related to "legitimate pedagogical concerns," the Supreme Court reasoned, school officials are given wide latitude to restrict student speech that is directly under their auspices.

The limits to student expression in schools depends on your interpretation of the guidelines and standards developed by the Court. Some educators and parents have applauded the *Hazelwood* decision as a step toward regaining control of the schools from undisciplined students. But at the same time, there are groups working to overturn *Hazelwood*. Justice William Brennan, writing the dissent in *Hazelwood*, interpreted the "*Tinker* standard" by asking the question, did the students' speech "materially disrupt classwork or involve substantial disorder or invasion of the rights of others?" Justice Brennan further stated that giving school authorities the right to censor student expression, on the grounds that the expression might violate the "*Tinker* standard," is to create an unacceptable "vaporous" standard. This standard would allow school authorities to act as "thought police." The end result might be that the only speech protected would be speech that is "state-approved."

At the heart of every constitutional issue is the inevitable paradox, inherent in a democracy, between the protection of individual rights and the need for an ordered society. Freedom of speech is at the center of what it means to live in a democracy. The task of all citizens is to understand both the latitude and the limits of free expression and develop an appreciation as to why the limits are appropriate.

Notes

1. Although the term "freedom of expression" does not appear in the language of the First Amendment, it is used here to describe the guarantees of freedom of speech, press, assembly, and petition.
2. John J. Patrick, *How to Teach the Bill of Rights* (New York: Anti-Defamation League, 1991), 34.
3. The English Parliament in 1792 enacted Fox's Libel Act. Although the Act did not specify whether or not truth could be used as a defense, the Act turned the issue of guilt or innocence over to the jury. Judges could no longer instruct the jury to find the defendant guilty or innocent merely because there was proof or not of publication. Prosecutions for seditious libel continued in England into the 19th century.
4. In 1694 the law requiring licenses before publication lapsed and was not renewed.
5. Sir William Blackstone, *Commentaries on the Laws of England, Book IV*, 151-152, as cited in Edward L. Barrett, William Cohen, and Jonathan D. Varat, *Constitutional Law: Cases and Materials. Eighth Edition* (Westbury, NY: The Foundation Press, Inc., 1989), 1201.
6. Blackstone, 202.
7. Leonard W. Levy, *Original Intent and the Framer's Constitution* (New York: Macmillan Publishing Co., 1988), 210.
8. See *New York Times v. Sullivan*, 376 U.S. 254 (1964).
9. The Alien Act was not formally evoked, but it did cause some aliens to leave the United States.
10. See Justice William Brennan's remarks in *New York Times v. Sullivan* (1964). "Fines levied in its [the Sedition Act] persecution were repaid by Act of Congress on the ground it was unconstitutional... Calhoun, reporting to the Senate on February 4, 1836, assumed that its validity was a matter 'which no one now doubts'.... Jefferson, as President, pardoned those who had been convicted and sentenced under the Act... .These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."
11. After Justice Harlan Stone's famous footnote #4 in the *Carolene Products Case*, 304 U.S. 144 (1938) indicated that certain rights should receive more exacting judicial scrutiny (see Chapter One of this volume), a few years later the Court declared, "Freedom of press, freedom of speech, freedom of religion are in a preferred position." See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).
12. John Stuart Mill, *On Liberty* (Indianapolis, IN: Bobbs-Merrill, 1956). See also, Justice Holmes's "marketplace of ideas" theory of the First Amendment in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919).
13. *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States* (1919).
14. *Schenck v. United States*, (1919).
15. *Abrams v. United States*, (1919).
16. *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).
17. *Gitlow v. New York*, 268 U.S. 652 (1925).
18. For a complete discussion of the doctrine of selective incorporation see Chapter One of this volume.
19. *Gitlow v. New York*, (1925).
20. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
21. See *Near v. Minnesota*, 283 U.S. 697 (1931).
22. In *New York Times v. Sullivan* (1964), for example, the Court held that the First Amendment's protection on speech embraces even false statements about public officials, unless the statements are made with actual malice.
23. See *Texas v. Johnson*, 491 U.S. 397 (1989). In *Johnson* the Court ruled that burning the American flag was protected expression under the First Amendment.
24. *Ginsburg v. New York*, 390 U.S. 629 (1968).
25. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).
26. *Minersville School District v. Gobitis*, (1940).
27. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
28. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). The Court distinguishes personal student expression from school-sponsored forums. See *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).
29. *Tinker v. Des Moines School District*, (1969).
30. *Tinker v. Des Moines School District*, (1969).
31. *Bethel v. Fraser*, 478 U.S. 675 (1986).
32. *Bethel v. Fraser*, (1986).
33. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

The Scripted Trial Case: *Chris Kritical v. Principal Watchermouth*

Background Information: *Chris Kritical v. Principal Watchermouth*

Chris Kritical, a senior at Gitlow High School, gave a speech (see Appendix B) at a voluntary school assembly nominating his friend for student-body vice president. Students who chose not to attend the assembly were permitted to go to study hall. The speech included several derogatory remarks about Gitlow High School and Principal Watchermouth. Some students in attendance at the assembly cheered in support, some laughed, and others appeared bewildered and embarrassed. The morning after the assembly, Chris was called into Principal Watchermouth's office and suspended from school for three days. Chris brought suit against the school claiming First Amendment protection for his nominating speech.

Principal Watchermouth believed Chris's speech to be in violation of Gitlow High School's Disruptive Conduct Rule (see Appendix A) and suspended him/her for three days. Chris's speech, according to Dr. Watchermouth, materially and substantially interfered with the educational process. Although Dr. Watchermouth believes that students possess constitutional rights at school, these rights are limited, especially when their exercise interferes with the school's important function—education.

Chris, however, contends that schools should be the "marketplace of ideas" and students should be given wide latitude to express their opinions. After all, isn't that what schools are for— to expose students to a wide range of views to help them to formulate their own? Shouldn't students be given the same opportunity to improve their school by voicing criticisms of the administration and other students running for elected office as citizens enjoy in attempting to improve their society and government?

The constitutional question you must decide is: Did Dr. Watchermouth violate Chris's right to freedom of expression as protected by the First Amendment to the Constitution? In deciding this case, you should invoke the "*Tinker* standard." Did Chris's speech cause a disruption that interferes with the normal school day or violate the rights of other students? It is certainly possible to formulate excellent arguments on both sides of this question.

Participants: *Chris Kritical v. Principal Watchermouth*

Judge:	O.L. Holmes, Jr.
Bailiff:	Pat L. Order
Defendant:	Principal Watchermouth, Gitlow High School
Plaintiff:	Chris Kritical, senior, Gitlow High School
Defense Counsel #1:	Sam P. Chase
Defense Counsel #2:	Francis Frankfurter
Plaintiff Counsel #1:	Kim Kennedy
Plaintiff Counsel #2:	Morgan Marshall
Witness for the Plaintiff:	Kelly Friend, junior, Gitlow High School
Witness for the Defense:	Lynn Goodey, sophomore, Gitlow High School

The Trial Script: *Chris Kritical v. Principal Watchermouth*

Bailiff: All rise. The Superior Court for the state of (name of state), is now in session. The Honorable O.L. Holmes, Jr. presiding.

Judge: (ENTER THE ROOM AND TAKE YOUR SEAT) Please be seated. This is the case of Chris Kritical versus Principal Watchermouth, which involves the charge that the defendant, Principal Watchermouth, denied the plaintiff, Chris Kritical, his/her First Amendment right to freedom of speech. Court is now in session. (STRIKE THE GAVEL) Is the plaintiff ready?

Plaintiff #1: (STAND) Yes, your Honor. (SIT DOWN)

Judge: Is the defense ready?

Defense #1: (STAND) Yes, your Honor. (SIT DOWN)

Judge: (LOOK AT THE PLAINTIFF) Counselor, you may proceed with your opening argument.

Plaintiff #1: (STAND UP, AND LOOK AT THE JURY) Your Honor, the plaintiff intends to show the following facts in this case. First of all, on the morning of February 16, 1998, Chris Kritical gave a nominating speech at a school-wide assembly in support of Richard Rights, a student running for vice-president of the Gitlow High School student body. Secondly, after his/her speech was finished, the assembly continued and students returned to their normal school day without disruption. Thirdly, that the next day, February 17th, Principal Watchermouth suspended Chris Kritical for three days citing the school's Disruptive Conduct Rule and removed his/her name from a list of potential graduation speakers. And finally, the plaintiff will show that Principal Watchermouth by suspending him/her violated Chris Kritical's First Amendment free speech right because the Disruptive Conduct Rule is vague and should not apply to Chris's speech. Principals should not be allowed to punish students whose speech they merely disagree with. In 1969, Justice Brennan expressed the concern that the "*Tinker* standard" would allow school officials to act as "thought police" resulting in the protection of only state approved speech. (SIT DOWN)

Judge: Thank you, counselor. The Court will now hear the defense's opening statement.

Defense #1: (STAND) Your Honor, the defense will show that Chris Kritical deliberately made derogatory messages during his/her nomination speech and that in doing so offended members of the student body, some teachers, and parents. Secondly, Mr./Ms. Kritical's speech caused a disturbance that violated Gitlow High School's Disruptive Conduct Rule. And finally, Principal Watchermouth was justified in suspending Chris Kritical and in doing so, did not violate his/her First Amendment right of free speech. Based on the "*Tinker* standard" established in 1969, speech which substantially interferes with a school's educational mission can be punished. According to *Bethel School District v. Fraser* decided in 1986, Chris's speech fits this category. (SIT DOWN)

Judge: Thank you. Will the plaintiff call its first witness?

Plaintiff #1: (STAND) The plaintiff calls Chris Kritical. (SIT DOWN)

Chris: (MOVE TO THE WITNESS STAND AND REMAIN STANDING)

Bailiff: (APPROACH THE WITNESS STAND) Raise your right hand, please. Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Chris: I do. (SIT DOWN)

Bailiff: (RETURN TO YOUR CHAIR)

Plaintiff #1: (STAND AND APPROACH THE WITNESS) State your name for the Court please.

Chris: Chris Kritical.

Plaintiff #1: Where do you go to school, Mr./Ms. Kritical?

Chris: I am a senior at Gitlow High School.

Plaintiff #1: Chris isn't it true that you are an honor student and a champion debater?

Defense #2: (STAND) Objection, your Honor, the counsel is leading the witness and this line of questioning is irrelevant to the case. (SIT DOWN)

Judge: Objection sustained.

Plaintiff #1: Your Honor, let me rephrase the question. How would you describe yourself as a student?

Chris: I'm a good student; I'm on the debate squad and I plan to go to college.

Plaintiff #1: Did you attend the nominating assembly at your school on February 16, 1998?

Chris: Yes, I attended the assembly.

Plaintiff #1: Did you give a nominating speech at the assembly?

Chris: Yes, my best friend asked me to give a nomination speech for him because he was running for student council vice-president.

Plaintiff #1: Your Honor, I ask that this speech be marked for identification as "plaintiff's exhibit A" (GIVE COPY TO THE BAILIFF FOR MARKING)

Bailiff: (MARK THE SPEECH WITH AN "A" AND HAND EXHIBIT TO P_AINTIFF) (See Appendix A.)

Plaintiff #1: (GIVE THE COPY TO THE WITNESS) Mr./Ms. Kritical, do you recognize this document which is marked "plaintiff's exhibit A?"

Chris: Yes, this is a copy of the speech I gave at the nomination assembly.

Plaintiff #1: (LOOK AT JUDGE) Your Honor: I offer this speech for admission into evidence as "plaintiff's exhibit A," and ask the court to so admit it.

Judge: You may proceed.

Plaintiff #1: Chris, will you please read the speech.
Chris: (READ THE SPEECH)

Plaintiff #1: Mr./Ms. Kritical, did your speech contain any profanity?

Chris: No, it did not.

Defense #2: (LOUDLY) Oh, that's a lot of bull.

Judge: (STRIKE THE GAVEL) One more outburst like that, counselor and I will find you in contempt.

Plaintiff #1: What was the message of your speech?

Chris: Well, I said that Richard was the best candidate for the office, and that his opponent was not trustworthy because she sided with Principal Watchermouth's policy of censoring student speech whenever possible.

Plaintiff #1: Why did you give your speech?

Chris: I read the speech because I felt the truth should be known. I don't think I should get into trouble because I told the truth. I have a right to free speech, don't I?

Plaintiff #1: What happened after you gave the speech?

Chris: Everyone clapped and cheered and then more speeches were given until we were finally dismissed back to our classes.

Plaintiff #1: Was there any kind of disturbance after you read your speech?

Chris: None that I saw. In fact, some people told me it was a great speech.

Plaintiff #1: What happened next?

Chris: Well . . . the next day Principal Watchermouth called me down to his/her office.

Plaintiff #1: Why did Principal Watchermouth call you down to the office?

Chris: I guess he/she called me down to his/her office because some people complained about the speech and that I had broken some kind of Disruptive Conduct Rule.

Plaintiff #1: Chris, do you understand the Disruptive Conduct Rule?

Chris: Not really. It doesn't specifically say what words students can't say and it doesn't tell you what the punishment will be if a student breaks the rule.

Plaintiff #1: Did Principal Watchermouth say why he/she suspended you?

Chris: He/She said I couldn't say the kind of things I said and get away with it. But I thought this was a free country and that the First Amendment says I can criticize anyone I want. Isn't that how students can make their school a better place?

Plaintiff #1: What happened next?

Chris: Principal Watchermouth told me I was suspended from school for three days and that my name was going to be removed from a list of potential graduation speakers.

Plaintiff #1: Mr./Ms. Kritical, do you believe Principal Watchermouth violated your First Amendment right to free speech?

Defense #1: (STAND) Objection, your Honor, counsel is asking the witness for a legal opinion when there has been no evidence admitted to establish the witness as a constitutional law expert. (SIT DOWN)

Judge: Sustained. Please rephrase your question.

Plaintiff #1: Thank you Mr./Ms. Kritical, I have no further questions, your Honor. (LOOK AT THE DEFENSE) Your witness. (SIT DOWN)

Defense #1: (STAND AND APPROACH THE WITNESS) Mr./Ms. Kritical, didn't Principal Watchermouth tell you that not only did some of the teachers, parents, and students complain about your speech, that in fact your speech was full of lies and offensive to some of the students in the audience?

Chris: Uh-huh, yes.

Defense #1: Didn't you admit to Principal Watchermouth that you deliberately and explicitly made derogatory statements about Principal Watchermouth and Richard Right's opponent?

Chris: Yes, I might have implied derogatory messages, but they were based on truth.

Defense #1: And isn't it true that after Principal Watchermouth told you that you had offended teachers, students, and parents and you admitted to him/her that you implied derogatory messages that he/she suspended you for violating the Disruptive Conduct Rule?

Chris: I guess so.

Defense #1: I have no further questions, your Honor. (SIT DOWN)

Judge: (LOOK AT THE WITNESS) You may step down. (LOOK AT THE PLAINTIFF) Counselor, you may call your next witness.

Plaintiff #2: (STAND) The plaintiff calls Kelly Friend. (SIT DOWN)

Kelly Friend: (MOVE TO WITNESS STAND AND REMAIN STANDING)

Bailiff: (APPROACH THE WITNESS STAND) Raise your right hand. Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Kelly: I do. (SIT DOWN)

Bailiff: (RETURN TO YOUR CHAIR)

Judge: You may proceed, counselor.

Plaintiff #2: (STAND AND APPROACH THE WITNESS) State your name, please.

Kelly: Kelly Friend.

Plaintiff #2: Where do you go to school?

Kelly: I am a junior at Gitlow High School.

Plaintiff #2: In your own words, would you describe what type of student you are?

Kelly: Well . . . I get mostly "A's" and "B's" in school.

Plaintiff #2: And have you ever been suspended from school?

Kelly: No, never. I am a model student.

Defense #2: (STAND) Objection, your Honor, the witness is expressing an opinion (SIT DOWN)

Judge: Sustained.

Plaintiff #2: Did you attend the nomination assembly on February 16, 1998?

Kelly: Yes, it was a great assembly; besides, I got to see all of my friends.

Plaintiff #2: Did you notice any kind of disturbance after Chris's speech was given?

Kelly: No, everyone thought it was great. Chris is really good with words.

Plaintiff #2: So, Chris's speech really wasn't offensive, was it?

Defense #2: (STAND) Objection, your Honor, the counsel is leading the witness. (SIT DOWN)

Judge: Sustained.

Plaintiff #2: Did anyone say the speech was offensive?

Kelly: Well, my friend Julie told me that all of her friends thought the speech was great. I don't think anyone was offended.

Defense #1: (STAND) Objection, your Honor, the witness's answer is based on hearsay and I ask that the statement be stricken from the record. (SIT DOWN)

Judge: Sustained, rephrase your question.

Plaintiff #2: Your Honor, I have no further questions. (LOOK AT THE DEFENSE) your witness. (SIT DOWN)

Defense #2: (STAND AND APPROACH THE WITNESS) Mr./Ms. Friend, isn't it true that last year you got an "F" in U.S. History?

Kelly: I'm not sure, but maybe I did.

Defense #2: And Mr./Ms. Friend, isn't it true that last semester you were on in-school suspension for two days?

Kelly: Uh-huh . . . But, I have never been suspended from . . .

Defense #2: Just answer the question yes or no.

Kelly: Yes.

Defense #2: And isn't it true that you helped Chris write his/her speech?

Plaintiff #2: (STAND) Objection, your Honor, counsel is asking the witness about matters that did not come up in direct examination. (SIT DOWN)

Judge: Sustained, please ask a different question.

Defense #2: No further questions, your Honor. SIT DOWN)

Judge: (LOOK AT WITNESS) You may step down. (LOOK AT PLAINTIFF) Counselor, call your next witness.

Plaintiff #1: (STAND) Your Honor, the plaintiff rests. (SIT DOWN)

Judge: (LOOK AT THE DEFENSE) Counselor, you may call your first witness.

Defense #1: (STAND) The defense calls Principal Watchermouth to the stand. (SIT DOWN)

Principal: (APPROACH THE WITNESS STAND)

Bailiff: (APPROACH THE WITNESS) Raise your right hand. Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth.

Principal: I do. (SIT DOWN)

Bailiff: (TAKE YOUR SEAT)

Judge: (LOOK AT DEFENSE) You may proceed, counselor.

Defense #1: (STAND AND APPROACH THE WITNESS) State your name for the Court, please.

Principal: Dr. Watchermouth.

Defense #1: And Dr. Watchermouth, where do you work?

Principal: I am the principal at Gitlow High School.

Defense #1: Principal Watchermouth, did you attend the nominating assembly on February 16, 1998?

Principal: Yes, I did.

Defense #1: Did you hear the speech that Chris Kritical gave at the assembly?

Principal: Yes, I most certainly did.

Defense #1: What happened during the assembly?

Principal: Chris' speech contained derogatory statements about Richard Rights' opponent and school policy.

Plaintiff #1: Objection your Honor, the witness is stating an opinion.

Judge: Sustained. (TO THE WITNESS) Please refrain from opinionated responses. Counselor, please continue.

Defense #1: Didn't teachers come up to you after the assembly and complain about Mr./Ms. Kritical's speech?

Plaintiff #1: (STAND) Objection, your Honor, counselor is leading the witness. (SIT DOWN)

Judge: Sustained. Please rephrase your question.

Defense #1: What happened immediately after the assembly?

Principal: Some of the teachers and students complained that Chris's speech was offensive and that it enticed some of the students to make derogatory gestures, during and after the assembly. In other words, his speech caused a disruption.

Defense #1: Does your school have a policy that deals with this kind of conduct?

Principal: Yes, Gitlow High has a policy called the Disruptive Conduct Rule that has been approved by the school board.

Defense #1: What happened next?

Principal: Classes resumed. And the next day I called Chris down to my office.

Defense #1: What happened then?

Principal: I told Chris that there had been complaints about his/her speech and that it had disrupted part of the school day. I then showed Chris the Disruptive Conduct Rule.

Defense #1: Your Honor, I ask that this copy of Gitlow High School's Disruptive Conduct Rule be marked for identification as "defense's exhibit A" (GIVE COPY TO BAILIFF FOR MARKING) (See Appendix B.)

Bailiff: (MARK THE COPY WITH AN "A" AND HAND EXHIBIT BACK TO THE DEFENSE)

Defense #1: (GIVE THE COPY TO THE WITNESS.) Principal Watchermouth, do you recognize this document which is marked "defense's exhibit A?"

Principal: Yes, this is a copy of the school's Disruptive Conduct Rule.

Defense #1: Your Honor, I offer this copy of the Disruptive Conduct Rule for admission into evidence as "defense's exhibit A," and ask the Court to so admit it.

Judge: You may proceed.

Defense #1: Principal Watchermouth, will you please read the rule?

Principal: (READ THE DISRUPTIVE CONDUCT RULE)

Defense #1: Principal Watchermouth, what kind of disruptions did the speech cause in school?

Plaintiff #1: (STAND) Objection, your Honor, counsel is leading the witness. (SIT DOWN)

Defense #1: Your Honor, Principal Watchermouth has already testified that disruptions did occur. I am merely trying to identify them.

Judge: Overruled. (TO THE WITNESS) You may answer the questions.

Principal: Well . . . during the assembly, some students shouted and cheered. Some other students stood up and made what appeared to be derogatory statements and gestures. After the assembly there was a lot of loud talk in the hallways that caused students to be late to their next class.

Defense #1: How long have you been a principal?

Principal: This is my 10th year as a principal.

Defense #1: Principal Watchermouth, do you deal with behavior as a part of your job?

Principal: Very much so. At Gitlow High we believe that discipline and moral development are as important as academic scholarship.

Defense #1: During the ten years you have been principal have you ever had to apply the Disruptive Conduct Rule?

Principal: Oh yes, many times.

Defense #1: So, in your expert opinion, didn't Chris Kritical violate this rule, and therefore, deserve to be suspended?

Plaintiff #1: (STAND) Objection, your Honor, the counsel is asking the witness to give an opinion. (SIT DOWN)

Defense #1: Your Honor, I have established that Principal Watchermouth is an expert concerning this particular rule and therefore should be allowed to answer the question.

Judge: The objection is overruled. (TO THE WITNESS) You may answer the question.

Principal: Yes, I believe Chris Kritical's conduct did violate the Disruptive Conduct Rule.

Defense #1: Principal Watchermouth, did you violate Chris Kritical's First Amendment right of free speech?

Principal: No, absolutely not. We all know that some speech is just not acceptable, especially in school settings.

Defense #1: No more questions, your Honor. (LOOK AT THE PLAINTIFF) Your witness, counselor. (SIT DOWN)

Plaintiff #1: (STAND AND APPROACH THE WITNESS) Principal Watchermouth, you testified that during the assembly some students shouted and cheered and that some students made derogatory gestures, correct?

Principal: Yes, I did.

Plaintiff #1: To the best of your knowledge, were there any disturbances that interfered with the rest of the school day?

Defense #1: (STAND) Objection, your Honor, the witness has no way of knowing everything that happened during the school day. (SIT DOWN)

Plaintiff #1: (LOOK AT THE JUDGE) Your Honor, Principal Watchermouth is in charge of Gitlow High School. He/She ought to know if there were any disturbances that interfered with the rest of the school day.

Judge: Overruled. (LOOK AT THE WITNESS) You may answer the question.

Principal: As I stated earlier, some of the teachers and students were quite upset and others were late for class.

Plaintiff #1: Principal Watchermouth, does the Disruptive Conduct Rule inform students of what they actually can or cannot say?

Principal: Not exactly, but how can a rule list all the words that can or can not be said?

Plaintiff #1: Principal Watchermouth, does the Disruptive Conduct Rule explain the consequences for violating the rule?

Principal: No, it does not, because each case is different.

Plaintiff #1: Isn't it true that you denied Chris Kritical his/her First Amendment right of free speech by suspending him/her because the Disruptive Conduct Rule is vague and the consequences for breaking the rule are not spelled out?

Principal: Absolutely not!

Plaintiff #1: No further questions, your Honor. (SIT DOWN)

Judge: (LOOK AT THE WITNESS) You may step down. (LOOK AT THE DEFENSE) Call your next witness, counselor.

Defense #2: (STAND) Your Honor, the defense calls Lynn Goodey. (SIT DOWN)

Lynn: (MOVE TO WITNESS STAND AND REMAIN STANDING)

Bailiff: (APPROACH THE WITNESS STAND) Raise your right hand. Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Lynn: I do. (SIT DOWN)

Bailiff: (RETURN TO YOUR CHAIR)

Defense #2: (STAND AND APPROACH THE WITNESS) State your name for the Court.

Lynn: My name is Lynn Goodey.

Defense #2: Mr./Ms. Goodey where do you go to school?

Lynn: I am a sophomore at Gitlow High School.

Defense #2: Lynn, did you attend the nomination assembly at your school on February 16, 1998?

Lynn: Yes, I did. I was never so disgusted in my life.

Defense #2: What do you mean, Mr./Ms. Goodey?

Lynn: I mean one of the speeches was really bad. The speech was full of rude stuff and ugly statements about the other student running for office and about how Principal Watchermouth runs the school. I got really angry! Chris shouldn't be allowed to tell those lies.

Defense #2: Who gave this speech?

Lynn: (POINT AT CHRIS KRITICAL) He/She did.

Defense #2: Did the speech offend anyone else?

Lynn: I heard one girl say she was offended and was going to tell her parents.

Plaintiff #2: (STAND) Objection, your Honor, the witness's answer is based on hearsay and I ask that the statement be stricken from the record. (SIT DOWN)

Judge: Sustained. (LOOK AT THE JURY) Please disregard the witness's last statement.

Defense #2: Did you see any disturbances at the assembly?

Lynn: Yes, I did. A lot of students were yelling and cheering. And a few of them made rude gestures.

Defense #2: Are you familiar with the Disruptive Conduct Rule?

Lynn: Yes, I am. The rule helps keep the troublemakers out of school. We are supposed to be learning in school, not trying to offend people like (LOOK AT CHRIS) Chris did.

Defense #2: Do you know Principal Watchermouth?

Lynn: Yes, I do. Principal Watchermouth is a very fair and honest person. He/She tries real hard to help students out who have problems. And he/she tries to get rid of troublemakers so that the rest of us can enjoy school.

Defense #2: Do you know anybody that Principal Watchermouth unfairly suspended?

Lynn: No, I don't; in fact, (LOOK AT CHRIS) I'm glad he/she suspended Chris Kritical.

Plaintiff #2: (STAND) Objection, your Honor, the witness is expressing an opinion. (SIT DOWN)

Judge: Sustained, please refrain from opinionated responses.

Defense #2: I have no further questions, your Honor. (LOOK AT THE PLAINTIFF) your witness, counselor. (SIT DOWN)

Plaintiff #2: (STAND AND APPROACH THE WITNESS) Mr. /Ms. Goodey, you testified that you heard Chris's speech, did you not?

Lynn: Yes. I heard the so-called speech.

Plaintiff #2: Did you hear any four-letter curse words?

Lynn: No, but he/she did say . . .
Plaintiff #2: Just answer the question.

Lynn: (LOOK ANGRY) No.

Plaintiff #2: Did you see any disturbances after the assembly during the rest of the day?

Lynn: I didn't see any disturbances; but students were talking about the speech and some of them were late for class.

Plaintiff #2: So, isn't it true that Chris's speech did not contain any profanity whatsoever and did not really cause a disturbance?

Lynn: Yes, but it really offended me.

Plaintiff #2: And isn't it true then that Principal Watchermouth suspended Chris without a good reason?

Lynn: That's not true!

Plaintiff #2: No further questions, your Honor. (SIT DOWN)

Judge: (LOOK AT WITNESS) You may step down. (LOOK AT THE DEFENSE) Call your next witness, counselor.

Defense #2: (STAND) Your Honor, the defense rests. (SIT DOWN)

Judge: (LOOK AT THE PLAINTIFF) Does the plaintiff wish to make a closing argument?

Plaintiff #2: (STAND) We do, your Honor.

Judge: (LOOK AT PLAINTIFF) You may proceed.

Plaintiff #2: (WALK AROUND THE TABLE AND APPROACH THE JURY BOX) Ladies and gentlemen of the jury, this case is very simple. First of all, the plaintiff has proven by a preponderance of the evidence that the defendant, Principal Watchermouth, violated Chris Kritical's First Amendment right of free speech. According to the 1969 U.S. Supreme Court case of *Tinker v. Des Moines School District*, students do not shed their rights when they enter the school house gate. Through the testimony of Kelly Friend, you heard that Chris is a good student and that his speech was nothing more than clever. Through the testimony of Chris Kritical you heard that the speech did not cause any type of disturbance and was not supposed to be offensive but merely tell the truth, and therefore, it did not violate the Disruptive Conduct Rule. The plaintiff has shown that the Disruptive Conduct Rule is vague and doesn't specify punishment standards. The rule should not be used to judge anyone. Ladies and gentlemen, you have no choice but to find the defendant (POINT TO PRINCIPAL WATCHERMOUTH) guilty of violating Chris Kritical's First Amendment right of free speech. Thank you. (SIT DOWN)

Judge: (LOOK AT THE DEFENSE) The Court will now hear the defense's closing argument.

Defense #2: (STAND, WALK AROUND THE TABLE, AND APPROACH THE JURY) Ladies and gentlemen of the jury, I want to thank you for all being patient through this trial. I agree with the plaintiff on one point: This case is very simple. The plaintiff has simply not proven that my client has violated Chris Kritical's First Amendment right of free speech. Through the testimony of Principal Watchermouth you have heard that Chris deliberately made derogatory messages in his speech. In doing so, Chris offended students, teachers and parents, and caused a disturbance. Therefore, Chris Kritical knowingly violated the Disruptive Conduct Rule for which he/she was suspended. Principal Watchermouth is not guilty; he/she did not violate the plaintiff's First Amendment right of free speech. According to the *Tinker* case, speech that materially or substantially interferes with the school day may be punished. Some speech, like that of Chris Kritical, is not acceptable and should not be allowed in school. Ladies and gentlemen, the defense asks you to return a verdict of not guilty. Thank you very much. (SIT DOWN)

Judge: (LOOK AT THE JURY) You have heard the evidence. It is now your job to decide whether the defendant, Principal Watchermouth, is guilty of violating plaintiff Chris Kritical's First Amendment right of free speech. You must determine whether or not the Disruptive Conduct Rule was violated. Please go with the Bailiff to the jury room and make your decision. When you have decided a unanimous verdict, you will return to the courtroom and inform the Court.

Bailiff: (STAND) All rise.

Jury: (FOLLOW THE BAILIFF TO THE JURY ROOM)

Judge: (AFTER THE JURY HAS LEFT) Please be seated.

AFTER THE JURY IS READY TO DELIVER ITS VERDICT

Bailiff: (STAND) All rise.

Judge: Please be seated. (LOOK AT JURY) Have you reached a verdict?

Head Juror: (STAND) Yes, your Honor.

Judge: What is that verdict?

Head Juror: Your Honor, we find the defendant GUILTY/NOT GUILTY. (SIT DOWN)

Judge: The defendant, Principal Watchermouth, has been found GUILTY/NOT GUILTY; the Superior Court for the State of (name of state) is adjourned. (STRIKE THE GAVEL)

Instructions for the Jury: *Chris Kritical v. Principal Watchermouth*

In this case, you have to decide whether or not Principal Watchermouth violated Chris Kritical's First Amendment right of free speech. Remember to consider the "*Tinker* standard" established in the landmark case of *Tinker v. Des Moines Independent School District* (1969). The standard requires that a public school may only censor student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others. . . ." To meet this standard, a school must show that the reason for the censorship of student expression was based on more than "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." The following questions will help you to decide the case.

1. Did Chris's speech cause a disturbance?
   __ yes __ no

2. Does Chris's speech invade the rights of others?
   __ yes __ no

3. Did Chris violate Gitlow High School's "Disruptive Conduct Rule?"
   __ yes __ no

4. Is Gitlow High School's "Disruptive Conduct Rule" overly broad and vague, thus enabling the administration to unconstitutionally limit the speech of students?
   __ yes __ no

Appendix A: Plaintiff's Exhibit A

Richard Rights will get the job done, before the school does a job on you. He thinks the censorship policy at this so-called school stinks. The administration here wants us all to believe this is such a great place to learn, but they won't let us write about teen pregnancy in the school newspaper or hold any kind of protest demonstrations. This place is a dictatorship, and Principal Watchermouth is the head dictator. Watchermouth should be fired! Richard Rights hates dictators as any good person does. Unlike his spineless opponent, who agrees with anything Principal Watchermouth says, Richard does not believe that principals have the right to act like a dictator and censor student speech anytime they feel like it. If the other candidate and Principal Watchermouth want to live under a dictatorship, then let them move to Cuba. I don't trust these lame-brained jerks! But you can surely trust Richard, so vote for Richard for student body vice-president and give them the shaft.

Appendix B: Defense's Exhibit A

DISRUPTIVE CONDUCT RULE: Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

Relevant U.S. Supreme Court Decisions

Key Holdings from Supreme Court Decisions

The case of *Chris Kritical v. Principal Watchermouth* is not exclusively based upon one U.S. Supreme Court case; rather, the case involves or could involve holdings from several decisions. *Tinker v. Des Moines Independent School District* (1969) established that although the school environment limited students constitutional rights, students do possess constitutional rights in the school environment. Further, *Tinker* established the standard by which student expression should be judged (i.e., did the speech cause a disruption that interfered with the school day or interfere with the rights of other students)?

In *Bethel School District No. 403 v. Fraser* (1986), the Court distinguished between the political speech that was protected in *Tinker* and the "lewd and obscene" speech that was a part of Matthew Fraser's nominating speech at a school assembly. The Court ruled that Fraser's speech ran counter to the "fundamental values of public school education" and that nothing in the First Amendment prohibited schools from prohibiting lewd and vulgar speech.

In *Hazelwood School District v. Kuhlmeier* (1988), the Court differentiated between personal student expression and student expression that was under the auspices of the school. This distinction gave school authorities greater latitude in controlling student speech that was attached to the school as long as the restrictions are "reasonably related to legitimate pedagogical concerns."

The abstracts of these cases, taken directly from the U.S. Supreme Court's decisions, are presented below. Which parts of these decisions best apply to the *Kritical* case? What things about the *Kritical* case distinguished it from the other cases? How do you think the Supreme Court would have ruled in *Kritical*?

Tinker et al. v. Des Moines Independent Community School District et al.
393 U.S. 503
Argued: November 12, 1968
Decided: February 24, 1969

The Facts of the Case:

Petitioners, three public school pupils in Des Moines, Iowa, were suspended from school for wearing black arm bands to protest the government's policy in Vietnam. They sought nominal damages and an injunction against a regulation that the respondents had promulgated banning the wearing of armbands. The District Court dismissed the complaint on the ground that the regulation was within the Board's power, despite the absence of any finding of substantial interference with the conduct of school activities. The Court of Appeals, affirmed the District Court's decision, which was reversed by the U. S. Supreme Court.

Key Holdings:

1. In wearing armbands, the petitioners were quiet and passive. They were not disruptive and did not impinge upon the rights of others. In these circumstances, their conduct was within the protection of the free speech clause of the First Amendment and the due process clause of the Fourteenth.

2. First Amendment rights are available to teachers and students, subject to application in light of the special characteristics of the school environment.

3. A prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, is not permissible under the First and Fourteenth Amendments.

Decision is reversed and remanded.

Dissenting Opinion, Justice Harlan:

"I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. At the same time I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion. Finding nothing in this record which impugns the good faith of respondents in promulgating the arm band regulation, I would affirm the judgment below."

Bethel School District No. 403 v. Fraser
478 U.S. 675
Argued: March 3, 1986
Decided: July 7, 1986

The Facts of the Case:

Respondent public high school student (hereafter respondent) delivered a speech nominating a fellow student for a student elective office at a voluntary assembly that was held during school hours as part of a school-sponsored educational program in self-government, and that was attended by approximately 600 students, many of whom were 14-year-olds. During the entire speech, respondent referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor. Some of the students at the assembly hooted and yelled during the speech, some mimicked the sexual activities alluded to in the speech, and others appeared to be bewildered and embarrassed. Prior to delivering the speech, respondent discussed it with several teachers, two of whom advised him that it was inappropriate and should not be given. The morning after the assembly, the Assistant Principal called respondent into her office and notified him that the school considered his speech to have been a violation of the school's "disruptive-conduct rule," which prohibited conduct that substantially interfered with the educational process, including the use of obscene, profane language or gestures. Respondent was given copies of teacher reports of his conduct, and was given a chance to explain his conduct. After he admitted that he deliberately used sexual innuendo in the speech, he was informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises. Review of the disciplinary action through petitioner School District's grievance procedures resulted in affirmance of the discipline, but respondent was allowed to return to school after serving only two days of his suspension. Respondent, by his father (also a respondent) as guardian *ad litem*, then filed suit in Federal District Court, alleging a violation of his First Amendment right to freedom of speech and seeking injunctive relief and damages under 42 U.S.C. 1983. The court held that the school's sanctions violated the First Amendment, that the school's disruptive-conduct rule was unconstitutionally vague and over broad, and that the removal of respondent's name from the graduation speakers list violated the due process clause of the Fourteenth Amendment. The court awarded respondent monetary relief and enjoined the School District from preventing him from speaking at the commencement ceremonies. The Court of Appeals is affirmed, but this decision was reversed by the U. S. Supreme Court.

Key Holdings:

1. The First Amendment did not prevent the school district from disciplining respondent for giving the offensively lewd and indecent speech at the assembly. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, distinguished. Under the First Amendment, the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, but it does not follow that the same latitude must be permitted to children in a public school. It is a highly appropriate

function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the school, and the determination of what manner of speech is inappropriate properly rests with the school board. First Amendment jurisprudence recognizes an interest in protecting minors from exposure to vulgar and offensive spoken language, *FCC v. Pacifica Foundation*, 438 U.S. 726, as well as limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children, *Ginsberg v. New York*, 390 U.S. 629. Petitioner school district acted entirely within its permissible authority in imposing sanctions upon respondent in response to his offensively lewd and indecent speech, which had no claim to First Amendment protection.

2. There is no merit to respondent's contention that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech would subject him to disciplinary sanctions. Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. The school disciplinary rule proscribing "obscene" language and the prespeech admonitions of teachers gave adequate warning to respondent that his lewd speech could subject him to sanctions.

Dissenting Opinion, Justice Marshall:

"I agree with the principles that Justice Brennan sets out in his opinion concurring in the judgment. I dissent from the Court's decision, however, because in my view the school district failed to demonstrate that respondent's remarks were indeed disruptive. The District Court and Court of Appeals conscientiously applied *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and concluded that the school district had not demonstrated any disruption of the educational process. I recognize that the school administration must be given wide latitude to determine what forms of conduct are inconsistent with the school's educational mission, nevertheless, where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education. Here the school district, despite a clear opportunity to do so, failed to bring in evidence sufficient to convince either of the two lower courts that education at Bethel School was disrupted by respondent's speech. I therefore see no reason to disturb the Court of Appeals' judgment.

Dissenting Opinion, Justice Stevens:

"Frankly, my dear, I don't give a damn." [Statement by actor Clark Gable in the movie, "Gone With the Wind."]

"When I was a high school student, the use of those words in a public forum shocked the Nation. Today Clark Gable's four-letter expletive is less offensive than it was then. Nevertheless, I assume that high school administrators may prohibit the use of that word in classroom discussion and even in extracurricular activities that are sponsored by the school and held on school premises. For I believe a school faculty must regulate the content as well as the style of student speech in carrying out its educational mission. It does seem to me, however, that if a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of its violation. The interest in free speech protected by the First Amendment and the interest in fair procedure protected by the due process clause of the Fourteenth Amendment combine to require this conclusion. . . .

"It seems fairly obvious that respondent's speech would be inappropriate in certain classroom and formal social settings. On the other hand, in a locker room or perhaps in a school corridor the metaphor in the speech might be regarded as rather routine comment. If this be true, and if respondent's audience consisted almost entirely of young people with whom he conversed on a daily basis, can we—at this distance—confidently assert that he must have known that the school administration would punish him for delivering it?

"For three reasons, I think not. First, it seems highly unlikely that he would have decided to deliver the speech if he had known that it would result in his suspension and disqualification from delivering the school commencement address. Second, I believe a strong presumption in favor of free expression should apply whenever an issue of this kind is arguable. Third, because the Court has adopted the policy of applying contemporary community standards in evaluating expression with sexual connotations, this Court should defer to the views of the district and circuit judges who are in a much better position to evaluate this speech than we are."

Hazelwood School District v. Kuhlmeier
484 U.S. 260
Argued: October 13, 1987
Decided: January 13, 1988

The Facts of the Case:

Respondents, former high school students who were staff members of the school's newspaper, filed suit in Federal District Court against petitioners, the school district and school officials, alleging that respondents' First Amendment rights were violated by the deletion from a certain issue of the paper of two pages that included an article describing school students' experiences with pregnancy and another article discussing the impact of divorce on students at the school. The newspaper was written and edited by a journalism class, as part of the school's curriculum. Pursuant to the school's practice, the teacher in charge of the paper submitted page proofs to the school's principal, who objected to the pregnancy story because the pregnant students, although not named, might be identified from the text, and because he believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students. The principal objected to the divorce article because the page proofs he was furnished identified by name (deleted by the teacher from the final version) a student who complained of her father's conduct, and the principal believed that the student's parents should have been given an opportunity to respond to the remarks or to consent to their publication. Believing that there was no time to make necessary changes in the articles if the paper was to be issued before the end of the school year, the principal directed that the pages on which they appeared be withheld from publication even though other, unobjectionable articles were included on such pages. The District Court held that no First Amendment violation had occurred. The Court of Appeals reversed, but the U. S. Supreme Court reversed this decision and affirmed the ruling of the District Court.

Key Holdings:

Respondents' First Amendment rights were not violated:

1. First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.

2. The school newspaper here cannot be characterized as a forum for public expression. School facilities may be deemed to be public forums [484 U.S. 260, 261] only if school authorities have by policy or by practice opened the facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. The school officials in this case did not deviate from their policy that the newspaper's production was to be part of the educational curriculum and a regular classroom activity under the journalism teacher's control as to almost every aspect of publication. The officials did not evince any intent to open the paper's pages to indiscriminate use by its student reporters and editors, or by the student body generally. Accordingly, school officials were entitled to regulate the paper's contents in any reasonable manner.

3. The standard for determining when a school may punish student expression that happens to occur on school premises is not the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, distinguished. Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

4. The school principal acted reasonably in this case in requiring the deletion of the pregnancy article, the divorce article, and the other articles that were to appear on the same pages of the newspaper. The decision is reversed.

Dissenting Opinion, Justice Brennan joined by Justice Marshall and Justice Blackmun:

"When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson. *Spectrum*, the newspaper they were to publish, 'was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a . . . forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution . . . .' 795 F.2d 1368, 1373 (CA8 1986). '[A]t the beginning of each school year,' id., at 1372, the student journalists published a Statement of Policy—tacitly approved each year by school authorities—announcing their expectation that '*Spectrum*, as a student-press publication, accepts all rights implied by the First Amendment . . . . Only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited.' App. 26 (quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 [1969]). The school board itself affirmatively guaranteed the students of Journalism II an atmosphere conducive to fostering such an appreciation and exercising the full panoply of rights associated with a free student press. 'School sponsored student publications,' it vowed, 'will not restrict free expression or diverse viewpoints within the rules of responsible journalism.' App. 22 (Board Policy 348.51). [484 U.S. 260, 278]

"This case arose when the Hazelwood East administration breached its own promise, dashing its students' expectations. The school principal, without prior consultation or explanation, excised six articles—comprising two full pages—of the May 13, 1983, issue of *Spectrum*. He did so not because any of the articles would 'materially and substantially interfere with the requirements of appropriate discipline,' but simply because he considered two of the six 'inappropriate, personal, sensitive, and unsuitable' for student consumption. 795 F.2d, at 1371.

"In my view the principal broke more than just a promise. He violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.

"The Court opens its analysis in this case by purporting to reaffirm *Tinker's* time-tested proposition that public school students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' Ante, at 266 (quoting *Tinker*, supra, at 506). That is an ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed. Instead of 'teaching children to respect the diversity of ideas that is fundamental to the American system,' *Board of Education v. Pico*, 457 U.S., at 880 (Blackmun, J., concurring in part and concurring in judgment), and 'that our Constitution is a living reality, not parchment preserved under glass,' *Stanley v. Northeast Independent School District, Bexar Cty., Tex.*, 462 F.2d 960, 972 (CA5 [484 U.S. 260, 291] 1972), the Court today 'teach[es] youth to discount important principles of our government as mere platitudes.' *West Virginia Board of Education v. Barnette*, 319 U.S., at 637. The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today."

Recent and Related United States Supreme Court Cases

Reno v. ACLU
Argued: March 19, 1997
Decided: June 26, 1997

The Facts of the Case:

The American Civil Liberties Union and others challenged the constitutionality of two provisions in the 1996 Communications Decency Act. The Act intended to protect minors from obscene Internet material by making it unlawful to intentionally transmit "obscene or indecent" messages, as well as the transmission of information that depicts or describes "sexual or excretory activities or organs" in a manner deemed "offensive" by community standards. After being forbidden by a District Court ruling from enforcing the above provisions (except for one concerning obscenity and its inherent protection against child pornography), Attorney General Janet Reno appealed directly to the Supreme Court as provided for by the Act.

The Decision:

The Court had to decide if certain provisions of the 1996 Communications Decency Act violated the First and Fifth Amendments by being overly broad and vague in their definitions of the types of Internet communications which it criminalized. The Court held that the Act's content-based and blanket restrictions on free speech violated the First Amendment. The Act failed to (1) clearly define "indecent" communications; (2) limit its restrictions to particular times or individuals; (3) provide supportive statements from an authority on the unique nature of Internet communications; or (4) demonstrate that the transmission of "offensive" material is devoid of any social value. Since the First Amendment distinguishes between "indecent" and "obscene" sexual expressions and protects only the former, the Act could be constitutionally permissible if it removed the words "or indecent" from its text.

Ladue v. Gilleo
512 U.S. 43
Argued: February 23, 1994
Decided: June 13, 1994

The Facts of the Case:

Margaret Gilleo placed a 24-by-36-inch sign calling for peace in the Persian Gulf on her front lawn. The original sign disappeared and a subsequent sign was knocked over. When she reported these incidents to the police, the police advised her that such signs were prohibited in Ladue. After Gilleo sued the city and the District Court ordered a preliminary injunction, Ladue repealed the law and replaced it with a new one that also banned window signs. After the ordinance went into effect, Gilleo then placed another anti-war sign in her second-story window and modified her complaint to contest the new ordinance.

The Decision:

The Supreme Court ruled that Ladue ordinance did violate Gilleo's right to free speech as protected by the First Amendment. Although conceding Ladue was within its police power to minimize visual clutter associated with signs, the Court held that the law "almost completely foreclosed a venerable means of communication that is both unique and important." The Court held a "special respect" for an individual's right to convey messages from her home.

Lamb's Chapel v. Center Moriches School District
508 U.S. 385
Argued: February 24, 1993
Decided: June 7, 1993

The Facts of the Case:

Consistent with a New York law authorizing schools to regulate the after-hour use of school property and facilities, Center Moriches School District prohibited the use of its property by any religious group. Lamb's Chapel was repeatedly denied by the school to use the school's facilities for an after-hours religious-oriented film series on family values and child rearing. The Chapel brought suit against the School District in federal court.

The Decision:

By a unanimous vote, the Supreme Court ruled that such a denial was unconstitutional. First, the District violated freedom of speech by refusing the Chapel's request to show movies on school premises solely because of the religious content of the films. Although non-public schools are permitted under New York law to restrict access to their premises based on content or speaker identity, such restrictions must be reasonable and "viewpoint neutral." By refusing access only to a religious perspective, the district violated the standard of reasonableness and neutrality. Second, permitting the Chapel to use the district's premises would not have violated the establishment clause. Public access to school facilities by religious groups after school hours is constitutionally permissible.

CHAPTER FOUR
The Establishment Clause

Congress shall make no law respecting an establishment of religion. . . .

—Amendment One, United States Constitution

The trial of *Kim Access v. Eastside Community Schools* raises some important constitutional issues. Among other issues, you are asked to decide whether or not the Equal Access Act[1] violates the establishment clause of the First Amendment. These introductory materials will help you to frame, debate, and ultimately decide this important and controversial question.

Origins of the Establishment Clause

The authors of the Bill of Rights, and presumably many other Americans of the late 18th century who argued for its ratification, were concerned enough about "establishments of religion" to include a clause in the First Amendment that prohibited official government sponsorship of religious institutions and provided for separation of church and state. Living under a government that did not "establish religion" was one of the few fundamental liberties the Bill of Rights was designed to protect. Still, what precisely was being protected by the establishment clause? And to what extent was their to be a separation of church and state? These questions are both controversial and debatable. A brief examination of "establishments of religion" during the colonial and founding periods might help you to form a more reasoned response to these questions and to the issues presented during the case treated in this chapter.

Prior to the American Revolution, most American colonies maintained establishments of religion in one form or another.[2] Five colonies (North and South Carolina, Virginia, Maryland, and Georgia) established the Church of England and taxed all residents, regardless of membership in the Church of England, for its support. Although each of these colonies financially supported one church, they did not, as in England, limit office holding to the official religion.[3] Conventional establishments of religion (i.e., resembling those in England), sparked heavy resistance from non-established groups in the American colonies.

Multiple establishments of religion, as noted constitutional historian Leonard Levy refers to them, existed in law or in fact in most of the New England colonies.[4] In Massachusetts, for example, the General Courts Act of 1692 required each town to elect an "able, learned, and orthodox minister" and support him through public taxation. Although the Congregationalist Church became established in most Massachusetts towns (Congregationalists outnumbered other religious groups in most Massachusetts towns), it was at least legally possible for Quakers, Baptists, or other non-Congregationalists to establish their religion in towns where they possessed a plurality.[5] In addition to the New England colonies, New York also maintained a multiple establishment of "Protestant religions" without preference to one Protestant religion over others.[6]

Added to the clusters of colonies maintaining single or multiple establishments of religion was a third cluster that established no religion at all. Colonial governments in Rhode Island, Delaware, New Jersey, and Pennsylvania provided no public support for their ministers and admitted Protestant Christians on an equal basis.[7]

After the Revolution, the nature of establishments of religion shifted in all of the colonies-turned-states. Momentum toward disestablishment and multiple establishment was the general rule in nearly every new state.[8] Common people, not just a state's most enlightened citizens, began to question any tax in support of religion as a violation of an individual and natural right. Virginia provides one example of the battle to disentangle government and religion during the founding period.

In Virginia, its Constitution of 1776 left open the possibility of a general assessment to be levied for religious support. This possibility fanned the fires of anti-establishment rhetoric during the founding period. "The Sundry Inhabitants of Prince Edward County," for example, suggested that "every tax upon conscious and private judgement be abolished and each individual left to rise or sink by his own merit."[9] In 1786, Virginia adopted what Thomas Jefferson had written and James Madison had argued for—The Virginia Statute for Religious Freedom.

To Jefferson, an establishment of religion violated an unalienable and fundamental right to believe as your own conscious dictates.[10] The statute clearly separates civil rights and religious opinions and makes clear the former has no dependence on the latter.

> *. . .to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even forcing him to support this or that teacher of his own religious persuasion, is depriving him of a comfortable degree of liberty.*

Religion and faith were designed by God, according to Jefferson, to be accepted or rejected individually using one's own reason and intellect. Since establishments of religion violated this principle, the statute made it unlawful to establish religions.

Although Virginia provides a good example of anti-establishment rhetoric during the founding era, citizens of other states also debated the proper relationship between the civil

and religious spheres of life throughout the founding period. Using the principles and language of natural rights, Americans transformed isolated and disconnected ideas against establishments of religion into a more coherent whole.

Judicial Interpretation

The courts, and more specifically the U.S. Supreme Court, have helped to provide more meaning to the establishment clause as it is applied to specific cases and controversies. A brief history of how the Supreme Court has interpreted and applied the establishment clause should help you to more precisely frame the issues in the *Access* case and help you decide its constitutional questions. Through the doctrine of *stare decisis*, these past decisions are important guideposts for current and future rulings and will also expose you to the history of establishment clause jurisprudence.

Although the original meaning of "establishment of religion" is still debated by historians and legal scholars,[11] it is clear that the establishment clause, like the rest of the Bill of Rights, was originally intended as a limit on the power of the national government. However, like most of the other rights in the Bill of Rights, the establishment clause has been incorporated by the due process clause of the Fourteenth Amendment and used to limit the power of the state governments.[12] Although the constitutional questions in *Cantwell v. Connecticut* (1940) centered on other First Amendment issues (i.e., freedom of speech and free exercise of religion), the Court incorporated the establishment clause in *Cantwell* by *obiter dictum* (words of an opinion entirely unnecessary to the case).[13]

The first case to address the establishment clause directly concerned a New Jersey law that paid a subsidy to parents who sent their children to school (public or parochial) on public transportation.[14] In *Everson v. Board of Education* (1947) the Court upheld the New Jersey law but accepted Thomas Jefferson's argument that the establishment clause "erected a wall separating church and state." Justice Hugo Black wrote for the majority of the Court:

> *The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."*[15]

Justice Black was the author of another early and significant establishment clause case, *McCollum v. Board of Education* (1948). In Champaign, Illinois members of the Jewish, Roman Catholic, and some Protestant faiths formed a voluntary association called the Champaign Council on Religious Education. Consistent with the board of education's policy, the council offered voluntary classes in religious instruction to public school students where parents so requested. The courses were conducted in the regular classrooms of the school building. Students who did not attend religious instruction were required to go to other parts of the building to pursue secular studies.

Despite their efforts attempting to treat religions equally (by adopting a policy that did not discriminate between three major religious orientations), the Supreme Court ruled that the school board's policy of "shared time" violated the establishment clause and was unconstitutional. The Court appeared to be most interested in the extent of involvement by public school officials and the use of "the public school machinery [e.g., compulsory attendance laws, use of the school building, the use of teachers and administrators for record keeping]" for religious purposes.

Four years later the Court ruled in *Zorach v. Clauson* (1952) that "released time" did not violate the establishment clause.[16] Released time (releasing students from certain periods to participate in religious instruction elsewhere) differs from "shared time" in one significant aspect—public school facilities are not used. Among other things, the Court ruled in Zorach:

> *We are a religious people whose institutions presuppose a Supreme Being. . . .When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.*[17]

During the early 1960s, the Court ruled on the constitutionality of prayer in public schools in two separate cases. In *Engel v. Vitale* (1962), the Court struck down a New York Board of Regents policy authorizing a short, voluntary prayer at the start of each school day as "wholly inconsistent with the establishment clause."[18] The next year (1963), the Court struck down an Abington Township (Pennsylvania) policy requiring students to read verses from the Bible and recite the Lord's Prayer as another clear violation of the establishment clause.[19] Important in both cases is the Supreme Court's rejection of the argument that to exclude some from of prayer in the public schools creates an environment that is hostile to traditional religion (i.e., a "religion of secular humanism") and therefore hostile to another fundamental liberty of the First Amendment, the free exercise clause, which provides for free expression of religion.

As the Supreme Court seemed continually to require government neutrality in establishment clause cases, the Court devised a test aimed at this goal. Relying on principles established by earlier cases, Chief Justice Warren Burger devised a test in *Lemon v. Kurtzman* (1971) that is still used in establishment clause cases today.[20] To be constitutional, an act must satisfy three criteria:

> *[F]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . . ; finally, the statute must not foster an excessive government entanglement with religion.'*[21]

Although the "three-part *Lemon* test" attempts to ensure government neutrality with respect to religion, the test, like the establishment clause itself, remains ambiguous and controversial. Nativity scenes placed on public property by city officials,[22] a state statute granting a state tax deduction for expenses toward attending public or private schools, including those sponsored by religious institutions, (including tuition, textbooks, or transportation),[23] and the opening of a state legislature with a prayer[24] have all passed the *Lemon* test; whereas a state law mandating the teaching of "creation science" in conjunction with the theory of evolution,[25] a state law requiring the posting of the Ten Commandments on the wall in each public school classroom[26] and a state program to provide remedial education and services to disabled children at religious schools[27] have all failed the *Lemon* test.

Several members of the current Supreme Court (e.g., Chief Justice Rehnquist, Justices Scalia, O'Connor, Kennedy, and Thomas) are not satisfied with the three-part *Lemon* test and would like to replace it with a different test. The justices disagree, however, on the precise test to employ in establishment clause cases. Justice O'Connor, for example, in a concurring opinion in *Lynch v. Donnelly* (1984) would have preferred an "endorsement test" over the *Lemon* test. The Court did not need to investigate "whether secular objectives for the legislation existed," argued O'Connor, "but rather, whether the government intend[ed] to convey a message of endorsement or disapproval of religion or whether the message had such an effect."[28]

Justice Kennedy, writing for the majority of the Court in *Lee v. Weisman* (1992), used the "coercive effect test" in ruling that a state-sponsored and directed religious exercise amounted to a violation of the establishment clause.[29] The Court reasoned that actions or practices of government that coerce, or have the effect of coercing, people to support or participate in religious activities are violations of the establishment clause.

In forming a reasoned judgement about the issues presented in the following trial, you will need to balance the weight of arguments on all sides of the issues. Living in a free society demands that government neither compel nor discourage religious beliefs. The task of all citizens is to understand fully the latitudes and the limits of religious freedom and to develop an appreciation as to when and why the limits are appropriate on both government power and individual liberty.

Notes

1. See 20 U.S.C. § 4071-74, 1984. For important excerpts from the Equal Access Act, see Appendix A.
2. Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan Publishing Co., 1986), 1.
3. See Thomas J. Curry, *First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986), 106. The constant need to attract more settlers made such English prohibitions illogical in the American colonies.
4. Levy, 15. Rhode Island did not establish a religion and was an exception to this general rule.
5. Levy, 15. The Baptist Church, for example, was established in Swansea, Massachusetts. Baptists ministers were supported by public taxation, including the Congregationalist minority in Swansea. Even in Massachusetts towns that established the Congregationalist Church, tax exemptions were periodically granted to Baptists and Quakers who did not want their money going to support the Congregationalist Church.
6. Levy, 12.
7. Curry, 106.
8. Massachusetts may be the only new state that actually strengthened its establishment of religion after the Revolution. Article III of the Massachusetts Constitution of 1780 did not allow for the tax exemptions the Baptists and Quakers previously enjoyed especially in Boston. However, although the Baptists, Quakers, Episcopalians, and Methodists were required to pay tax, they also received support under the Massachusetts Constitution of 1780. See Levy, 25-33.
9. Thomas E. Buckley, "The Political Theology of Thomas Jefferson," in *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History*, eds. Merrill Peterson and Robert Vaughan, (Cambridge: Cambridge University Press, 1988), 137.
10. Buckley, 83.
11. Two common interpretations of the establishment clause are (1) government is not to support or advance religion, monetarily or otherwise (i.e., a "separation of church and state"); or, (2) government can support religion as long as it does so on an equal basis (i.e., without preference to one religion over another). Both positions have been supported by different scholars and jurists in the ongoing debate on the meaning and interpretation of the establishment clause.
12. For a more complete discussion of the doctrine of selective incorporation, see Chapter One of this volume.
13. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
14. Before the decision in *Everson v. Board of Education*, 380 U.S. 1 (1947), the Supreme Court remarkably did not find occasion to address the establishment clause. Only a handful of cases prior to *Everson* involved the establishment clause and, those that did also involved other constitutional issues. See *Cochran v. Board of Education*, 281 U.S. 370 (1930). Although the *Cochran* decision primarily involved the establishment clause issue (i.e., government purchase of secular textbooks for use in parochial schools), the Court relied more on the takings clause of the Fifth Amendment.
15. *Everson* v. *Board of Education*, (1947).
16. *Zorach v. Clauson*, 343 U.S. 306 (1952).
17. *Zorach v. Clauson*, (1952).
18. *Engel v. Vitale*, 370 U.S. 421 (1962).
19. *Abington Township v. Schempp*, 374 U.S. 203 (1963).
20. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
21. *Lemon v. Kurtzman*, (1971).
22. *Lynch v. Donnelly*, 465 U.S. 668 (1984). In subsequent decisions, however, the Supreme Court has examined the nature and physical setting of religious displays on government property. In *Allegheny v. ACLU*, 492 U.S. 573

(1989), for example, the Court ruled that an Allegheny County (Pennsylvania) nativity scene, by prominently displaying the words "Glory to God for the birth of Jesus Christ," sent clear message supporting Christian orthodoxy and thus was a violation of the establishment clause. In the same case the Court ruled that a display involving the menorah was constitutionally permissible given its "particular physical setting."

23. *Mueller v. Allen*, 463 U.S. 388 (1983).
24. *Marsh v. Chambers*, 463 U.S. 783 (1983).
25. *Edwards v. Aguillard*, 482 U.S. 578 (1987).
26. *Stone v. Graham*, 449 U.S. 39 (1980).
27. *Aguilar v. Felton*, 473 U.S. 402 (1985). The Supreme Court overruled this decision in 1997, ruling that only those policies that generate an excessive conflict between church and state will be deemed to violate the establishment clause. See *Agostini v. Felton* (1997).
28. *Lynch v. Donnelly*, (1984).
29. *Lee v. Weisman*, 505 U.S. 577 (1992).

The Scripted Trial Case: *Kim Access v. Eastside Community Schools*

Background Information: *Kim Access v. Eastside Community Schools*

After attending a Christian rock concert and seeing the surprising number of young people interested in Christianity, Kim Access, a senior at Eastside High School, thought it would be great to get together with other Christian kids from Eastside and form a Christian Bible Club. She went to Principal Tracey Jefferson with the idea of forming a Christian club that would, like all other clubs at Eastside, meet after school. Although Eastside High School maintained a diverse club system (see Appendix C) and generally encouraged students to form and participate in clubs, Principal Jefferson and the Eastside Board of Education, felt that Kim's idea for a Christian Bible Club would violate the "wall separating church and state" as well as School Board Policy 5610 (see Appendix B) and refused to grant her request.

Kim and her parents hired an attorney, Stacey Rehnquist, to see if she had any recourse against the school. A specialist in constitutional law, Rehnquist immediately recalled a Supreme Court decision that sounded similar to Kim's situation. She told Kim that the Supreme Court had ruled in 1981 (*Widmar v. Vincent*) that the University of Missouri at Kansas City's policy of denying access to its facilities to a student religious group was an unconstitutional restriction on the students' right to freedom of expression. In that case, the Court ruled that a policy of "equal access" to school facilities would not be incompatible with the establishment clause.

Rehnquist also believed the Equal Access Act (see Appendix A) applied to Eastside as well. The Equal Access Act made it unlawful for public secondary schools that receive federal financial assistance and maintain a "limited open forum" (i.e., those that have at least one student club that is non-curriculum related) to deny equal access to their facilities by students on the basis of "religious, political, philosophical, or other content of [student] speech at such meetings." Rehnquist felt confident that the Equal Access Act applied to Eastside, but was the Act itself a violation of the establishment clause? Was there a difference between the college students in the *Widmar* case and high school students in Kim Access' case?

Kim Access believed Eastside was denying her rights. What she wanted to do was simple: get together after school with other students at Eastside to pray and talk about the Bible. Nobody would be forced to join the club or come to meetings and all Christian denominations would be welcome. How could that violate the establishment clause? If anything, the school was creating an environment that was hostile to religion. There was a wide variety of clubs at Eastside, thought Access, why is it only a "religious club" that is discriminated against?

Looking over the list of clubs at Eastside (see Appendix C) Principal Jefferson and the Eastside School Board were not sure if Eastside had created a "limited open forum." Further, even if they had and the Equal Access Act applied to the school, they were sure that the act was unconstitutional. How could students be allowed to pray at a public school without such a policy violating the establishment clause? Didn't parents have the right to send their children to a public school without having to worry about the potential for evangelizing? Is it fair to use public facilities for religious purposes? In addition, Principal Jefferson believed that a Christian club would not be consistent with Eastside's policy of trying to provide its students with balanced perspectives on private and controversial issues.

You must decide two main questions during this trial, one statutory and one constitutional:

1. Does the Equal Access Act apply to Eastside High School?
   - A. Is Eastside High School a public secondary school that receives federal financial assistance?
   - B. Does Eastside maintain a "limited open forum" by having at least one noncurriculum related club?
2. Is the Equal Access Act a violation of the establishment clause and thus unconstitutional? (Does the Act meet the three-part Lemon test?)
   - A. Does the statute have a secular (i.e., not religious) legislative purpose?
   - B. Does the statute's principal or primary effect advance or inhibit religion?
   - C. Does the statute foster an excessive government entanglement with religion?

Participants: *Kim Access v. Eastside Community Schools*

Judge:	H. Black
Bailiff:	Pat L. Order
Defendant:	Tracy Jefferson, Principal, Eastside High School
Plaintiff:	Kim Access, student, Eastside High School
Defense Council #1:	Chris Marshall
Defense Council #2:	Alex Burger
Plaintiff Council #1:	Stacey Rehnquist
Plaintiff Council #2:	Jamie Kennedy
Witness for Defense:	Dr. Brooke Scholars, Law and Education Professor, Indiana University
Witness for Plaintiff:	Dr. Jordan Brainspector, Law and Education Professor, Columbia University

The Trial Script: *Kim Access v. Eastside Community Schools*

Bailiff: (STAND) All rise. The United States District Court for the District of (name of state), is now in session. The Honorable H. Black presiding.

Judge: (ENTER THE ROOM AND TAKE YOUR SEAT) Please be seated. This is the case of Kim Access versus Eastside Community Schools. Access and his/her parents seek an injunction from this Court ordering Eastside High School to allow a Christian Bible Club to meet after school and damages for violating the Constitution and laws of the United States. Court is now in session. (STRIKE THE GAVEL) Is the plaintiff ready?

Plaintiff #1: (STAND) Yes, your Honor. (SIT DOWN)

Judge: Is the defense ready?

Defense #1: (STAND) Yes, your Honor. (SIT DOWN)

Judge: (LOOK AT THE PLAINTIFF) Counselor, you may proceed with your opening statement.

Plaintiff #1: (STAND AND APPROACH THE JURY) Ladies and gentlemen of the jury, the plaintiff will show the following facts in this case:

First, that the Equal Access Act applies to Eastside High School. The Equal Access Act applies to all public secondary schools that receive federal financial assistance and maintain a "limited open forum." The plaintiff will establish that Eastside High is precisely the type of school for which the legislation was written.

Second, the plaintiff will show that Principal Jefferson and Eastside High School, by denying Access the opportunity to use school facilities, not only violated the Equal Access Act, but also the students' free speech, free exercise of religion, and free association rights as protected by the First and Fourteenth Amendments to the Constitution. Principal Jefferson and Eastside High School have established a policy of discrimination against religious expression that is, according to the Supreme Court in *Widmar v. Vincent*, unconstitutional.

Finally, the plaintiff will show that the Equal Access Act and the use of school facilities by a Christian Bible Club does not violate the establishment clause. In other words, the Act passes the three-part *Lemon* test established by the Supreme Court in *Lemon v. Kurtzman*. We will show the Act has a secular legislative purpose; does not advance nor inhibit religion; and, does not foster an excessive government entanglement with religion.

What the plaintiff seeks from you, the jury, is simple: require Eastside High School to live up to the letter and spirit of the Equal Access Act and the principles established by the Supreme Court in *Widmar v. Vincent* by requiring the school to allow Access and his/her friends the use of school facilities for their Christian Bible Club. (SIT DOWN)

Judge: Thank you, counselor. The Court will now hear the defense's opening statement.

Defense #1: (STAND) Thank you, your Honor. (APPROACH THE JURY) Ladies and gentlemen of the jury, you will render an important decision in this case. Eastside High School and Principal Jefferson are attempting to abide by an important principle of the Constitution that requires the separation of church and state. Nonetheless, the school is being asked to put this important constitutional principle aside and replace it with an unconstitutional act of Congress that would allow a Christian club to meet on school property. After hearing all the evidence you must decide that (1) the Equal Access Act does not apply to Eastside; (2) even if it did, the Equal Access Act violates the establishment clause of the First Amendment; and (3) that Eastside's refusal to allow the Christian Club to meet on school premises does not interfere with students' rights to freedom of expression and association.

The Equal Access Act does not apply to Eastside because the school does not maintain a "limited open forum" as stipulated by the Act. All of Eastside's clubs are directly related to the curriculum of the school and, according to Eastside School Board Policy 5610, must have a faculty sponsor.

The defense will show that the Equal Access Act is at odds with the establishment clause of the First Amendment. *Widmar v. Vincent* is not an appropriate precedent for this case. *Widmar* was about university students, the case you are deciding is about high school students. Although university students might be able to distinguish between religious toleration and religious advancement, many high school students cannot. Access seeks to unconstitutionally join church and state by getting the official endorsement of Eastside High School. Such a policy does not pass the three-part *Lemon* test established by the Supreme Court in *Lemon v. Kurtzman*. In particular, allowing a Christian Bible Club to meet on school property and use the "machinery of the school" to promote a religious organization has the primary effect of advancing religion and fosters an excessive entanglement of government and religion.

Finally, although the defense realizes that by not allowing Access and the Christian club to meet on school premises, Principal Jefferson and Eastside High School are limiting a small class of religious speech, they have "legitimate pedagogical purposes" for doing so. According to the Supreme Court in *Hazelwood School District v. Kuhlmeier*, school authorities that have legitimate educational purposes for limiting student speech must be given wide latitude in their restrictions. (SIT DOWN)

Judge: Thank you. The plaintiff will call its first witness.

Plaintiff #1: (STAND) The plaintiff calls Principal Tracy Jefferson. (SIT DOWN)

Principal: (MOVE TO THE WITNESS STAND AND REMAIN STANDING)

Bailiff: (APPROACH THE WITNESS STAND) Raise your right hand, please. Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Principal: I do. (SIT DOWN)

Bailiff: (RETURN TO CHAIR)

Plaintiff # 1: (STAND AND APPROACH THE WITNESS) State your name for the Court please.

Principal: My name is Tracy Jefferson.

Plaintiff #1: Where do you work and in what capacity?

Principal: I am the principal at Eastside High School.

Plaintiff #1: Mr./Ms. Jefferson, are you aware of the Equal Access Act?

Principal: Yes, now I am very aware of the Equal Access Act.

Plaintiff #1: Your honor, I ask that this document be marked for identification as "plaintiff's exhibit A." (GIVE COPY TO THE BAILIFF FOR MARKING) (See Appendix A.)

Bailiff: (MARK THE LEGISLATION WITH AN "A" AND HAND EXHIBIT TO PLAINTIFF)

Plaintiff #1: Mr./Ms. Jefferson do you recognize this document that is marked as "plaintiff's exhibit A?"

Principal: Yes, this is a copy of the Equal Access Act.

Plaintiff #1: Your Honor, I offer this document for admission into evidence as "plaintiff's exhibit A."

Judge: You may proceed.

Plaintiff #1: Principal Jefferson, would you please read part (a) of the Equal Access Act.

Principal: (READ PART [a])

Plaintiff #1: Mr./Ms. Jefferson does the Equal Access Act apply to Eastside High School?

Principal: We are a public secondary school that receives federal financial assistance, like most public schools do, but I don't know if we have a "limited open forum" or not.

Plaintiff #1: Principal Jefferson, could you read part (b) of the Equal Access Act.

Principal: (READ PART [b])

Plaintiff #1: How would you describe the club system at Eastside?

Principal: It is one of the finest I know of; Eastside students have a wide variety of choices. And all of our clubs are related to some aspect of the school curriculum.

Plaintiff #1: Isn't it possible for a reasonable person to disagree with your interpretation?

Defense #1: (STAND) Objection, your honor. Counsel is leading the witness.

Judge: Sustained. Please rephrase your question, counselor.

Plaintiff #1: Have you ever denied access to a group of students who wanted to form a club at Eastside?

Principal: Yes, I didn't allow Kim Access and her friends to form a Christian Bible Club because of the separation of. . .

Plaintiff #1: Principal Jefferson, do you always break laws you are familiar with?

Defense #1: (STAND) Objection, your honor. The witness' character or reputation is not at issue.

Judge: Sustained. (LOOK AT THE WITNESS) Please finish your prior response.

Principal: As I was saying, I didn't allow Kim and his/her friends access to the school because of the separation of church and state and School Board Policy 5610. Also, as an educator I have concerns with the formation of a Christian club at a public school. I told her she could meet informally at school, but that wasn't good enough for Kim.

Access: (STAND) You are such a liar! You never said anything but "no."

Judge: (POUND THE GAVEL AND LOOK AT KIM ACCESS) Please refrain from commenting during testimony, Mr./Ms. Access.

Plaintiff #1: Thank you, Mr./Ms. Jefferson. I have no further questions, your Honor. (LOOK AT THE DEFENSE) Your witness. (SIT DOWN)

Defense #1: (STAND AND APPROACH THE WITNESS) Principal Jefferson, isn't it true that Eastside High School is committed to abiding by the Constitution?

Principal: Yes, of course.

Defense #1: Isn't it also true that Eastside has an established policy for clubs?

Principal: Yes, School Board Policy 5610.

Defense #1: Your honor, I ask that this document be marked for identification as "defense's exhibit A." (GIVE COPY TO BAILIFF FOR MARKING) (See Appendix B.)

Bailiff: (MARK THE DOCUMENT WITH AN "A" AND EXHIBIT TO DEFENSE)

Defense #1: (GIVE COPY TO THE WITNESS) Principal Jefferson, do you recognize the document marked as "defense's exhibit A?"

Principal: Yes, this is School Board Policy 5610.

Defense #1: (LOOK AT JUDGE) Your honor, I offer this into admission as "defense's exhibit A."

Judge: You may proceed.

Defense #1: Please read for the court School Board Policy 5610.

Principal: (READ SCHOOL BOARD POLICY 5610)

Defense #1: Isn't it true, that allowing the formation of a Christian Bible Club at Eastside would violate School Board Policy 5610?

Principal: Yes, because a Christian Bible Club would be sponsored by a religious organization.

Defense #1: Why else did you deny access to Mr./Ms. Access?

Principal: Because all clubs must have a faculty sponsor and faculty sponsorship of a religious organization violates the establishment clause of the First Amendment. What Kim and his/her friends were really asking for was the school's endorsement of Christianity as a religious belief. The establishment clause requires. . .

Plaintiff #1: (STAND) Objection, your Honor. The witness is providing a narrative.

Judge: Sustained. (LOOK AT WITNESS) Please respond directly to the questions, Mr./Ms. Jefferson.

Defense # 1: Principal Jefferson, didn't you say during direct examination that you had "educational concerns" with the formation of Christian Bible Club at Eastside?

Principal: Yes, I did.

Defense #1: What kind of "educational concerns?"

Principal: Eastside attempts to balance its treatment of sensitive and private issues. A Christian Bible Club does not provide the kind of balanced treatment of religious content that we feel comfortable with.

Defense #1: Does the Equal Access Act apply to Eastside?

Principal: I don't think so; we do not have a "limited open forum."

Defense #1: Are you saying that Eastside's clubs are all related to the school curriculum?

Principal: Yes, all of them.

Defense #1: I have no further questions your Honor. (SIT DOWN)

Judge: (LOOK AT THE WITNESS) You may step down. (LOOK AT THE PLAINTIFF) Counselor, you may call your next witness.

Plaintiff #1: (STAND) The plaintiff calls Dr. Jordan Brainspector.

Brainspector: (MOVE TO THE WITNESS STAND AND REMAIN STANDING)

Bailiff: (APPROACH THE WITNESS) Raise your right hand. Do you swear or affirm the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Brainspector: Yes, as nearly as any of us knows what the "truth" is.

Bailiff: (LOOK CONFUSED AND RETURN TO YOU CHAIR)

Judge: You may proceed counselor.

Plaintiff #1: Could you state your name for the Court?

Brainspector: My name is Dr. Jordan Brainspector.

Plaintiff #1: Dr. Brainspector, how are you employed and for what period of time?

Brainspector: I have been a professor at Columbia University for 23 years.

Plaintiff #1: What advanced degrees to you hold and where did you get them?

Brainspector: I was in the dual degree program at Harvard University. I hold a Ph.D. in Educational Psychology and a J.D. from Harvard Law School.

Plaintiff #1: In what areas do you research, write, and teach?

Brainspector: For most of my career, I have been interested in the intersection of constitutional rights and the psychological development of children. My latest book, *Cognitive Psychology and the First Amendment Rights of Children* is one example.

Plaintiff #1: In your opinion, does a public secondary school that denies access to a voluntary Christian club violate the constitutional rights of students?

Defense #1: (STAND) Objection, your Honor. Counsel is asking for an opinion.

Plaintiff #1: Your Honor, I have already established that the witness is an expert in this area.

Judge: Objection overruled. (LOOK AT WITNESS) You may answer the question.

Brainspector: A public school that maintains a "limited open forum" for student speech and rejects a club on the basis of the religious content of student speech would be violating the students' constitutional rights to freedom of speech. The Supreme Court in *Widmar v. Vincent* held that by denying a religious group access to its facilities, the University of Missouri—Kansas City violated a fundamental principle of the regulation of speech—that the regulations be content neutral.

Plaintiff #1: Dr. Brainspector, are you familiar with the Equal Access Act?

Brainspector: Very familiar. Basically, in passing the Equal Access Act Congress attempted to apply the principles of *Widmar v. Vincent* to secondary schools.

Plaintiff #1: Does the Equal Access Act apply to Eastside High School?

Brainspector: Yes. If it doesn't apply to Eastside, it wouldn't apply to any school.

Plaintiff #1: In your expert opinion, does the Equal Access Act or a public secondary school that allows access to religious clubs violate the establishment clause of the First Amendment?

Brainspector: No. Both the Equal Access Act and such a policy pass the three-part *Lemon* test established by the Supreme Court in *Lemon v. Kurtzman*. Both have a secular or non-religious purpose; neither advances nor inhibits religion; and, neither the Act nor such a policy fosters an excessive government entanglement with religion. In fact, a policy of not allowing access to school facilities may even create an environment that is hostile to religion and infringe upon other constitutional rights of students.

Plaintiff #1: Dr. Brainspector, what other constitutional rights would be at risk if a public secondary school refused to grant access to student religious groups?

Brainspector: Freedom of expression, freedom of association, and free exercise of religion. *Tinker v. Des Moines Independent School District* established that students do not shed their constitutional rights at the schoolhouse gate.

Plaintiff #1: Nothing further, your Honor. (LOOK AT THE DEFENSE) Your witness counselor. (SIT DOWN)

Defense #1: (STAND AND APPROACH THE WITNESS) Isn't it true, that you consider yourself a "born-again Christian?"

Plaintiff #1: (STAND) Objection, your Honor.

Judge: On what grounds counselor?

Plaintiff #1: This line of questioning is irrelevant.

Defense #1: Your Honor, the witness has provided expert testimony. This line of questioning could call the witness' credibility into question.

Judge: Objection overruled. (LOOK AT THE WITNESS) You may answer the question.

Brainspector: Yes, I do.

Defense #1: So isn't it fair to say, that your reading of the establishment clause, as a "born again Christian," might be different than other scholars?

Brainspector: I suppose so, yes.

Defense #1: Dr. Brainspector, would you say that students' constitutional rights in public school settings are identical to citizens' constitutional rights in other settings?

Brainspector: Not identical, no.

Defense #1: Isn't it true that the Supreme Court has ruled that the constitutional rights of students are limited in the school environment?

Brainspector: Well, yes to a degree, but. . .

Defense: Please just answer the question, Doctor. Isn't it true that the Supreme Court has ruled that the state has an important interest in providing a safe and healthy learning environment for its students—so important, in fact, that the state interests in educating its citizens often times overshadows students' constitutional rights?

Brainspector: Yes, but that does not mean students do not have constitutional rights in public school settings. Keep in mind, the Court said in *Tinker*. . .

Defense #1: I'll try. Dr. Brainspector, you testified during direct examination that Congress attempted to codify the principles established by the Supreme Court in *Widmar v. Vincent* in passing the Equal Access Act. Is that correct?

Brainspector: Yes, I did.

Defense #1: Aren't the two cases really unique though?

Brainspector: I wouldn't say unique. Different, but not unique.

Defense #1: Isn't it true the Supreme Court also recognized the differences between college students and secondary students in footnote fourteen in *Widmar*?

Brainspector: Well, footnote fourteen does say that university students are less impressionable than "younger" students and better able to distinguish between a school's policy of toleration for religion and sponsorship of religion. But they did not define what they meant by "younger."

Defense #1: Isn't it possible, that secondary students who attend a school that maintains a Christian Bible Club might receive the message that the school is advancing Christianity?

Brainspector: Not for most secondary students. In my opinion, most secondary students, like most college students, are capable of distinguishing between toleration and sponsorship.

Defense #1: But it is possible that some secondary students would not be capable of such a distinction?

Brainspector: I suppose that is possible.

Defense #1: So, would you agree, at least for those secondary students who could not distinguish between toleration and sponsorship, a policy of access to school facilities by a Christian club would have the primary effect of advancing religion?

Brainspector: Yes, but the vast majority of secondary students are quite capable of formal operational reasoning that is required to make such a distinction.

Defense #1: So, for those few students, such a policy would violate the second prong of the three-part *Lemon* test, correct?

Brainspector: Well, I guess it could be construed that way, but. . .

Defense #1: Also, Dr. Brainspector, doesn't a public secondary school policy that allows access to its facilities by Christian clubs risk the possibility of an excessive entanglement of government and religion?

Brainspector: In my judgment, no.

Defense #1: Isn't it true that a policy of equal access to public school facilities by religious groups would require the use of the machinery of the school; therefore excessively entangling government and religion?

Brainspector: Not excessively, no.

Defense #1: No further questions, your Honor. (SIT DOWN)

Judge: (LOOK AT WITNESS) You may step down. (LOOK AT PLAINTIFF) Counselor, call your next witness.

Plaintiff #1: Your Honor, the plaintiff rests. (SIT DOWN)

Judge: (LOOK AT THE DEFENSE) Counselor, you may call your first witness.

Defense #2: (STAND) The defense calls Kim Access to the stand. (SIT DOWN)

Access: (APPROACH THE WITNESS STAND)

Bailiff: (APPROACH THE WITNESS) Raise your right hand. Do you swear or affirm the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Access: Of course. (SIT DOWN)

Bailiff: (TAKE YOUR SEAT)

Judge: (LOOK AT THE DEFENSE) You may proceed counselor.

Defense #2: (APPROACH THE WITNESS) Mr./Ms. Access, why did you want to form a Christian Bible Club at Eastside High School?

Access: Why do other kids want to form clubs?

Defense #2: Please just answer the question.

Access: I just thought it would be really neat to get together with other Christian students at Eastside, not tied to any denomination, to pray and talk about the Bible.

Defense #2: When Principal Jefferson denied your request, did he/she offer any alternatives to meeting at school?

Access: Not right away like he/she says. Eventually, he/she said that the church across the street would let us meet there. That's when we really got mad. Why should we be treated differently than other students who want to form clubs?

Defense #2: Please, Mr./Ms. Access, attorney's are suppose to ask the questions during a trial. Why wasn't the church, less than 100 feet from the school, an acceptable alternative?

Access: It would have been a hassle, and it made us feel like outcasts in our own school.

Defense #2: Isn't it true that what you really wanted was an endorsement for your Christian Bible Club from Eastside, a public high school?

Plaintiff #2: (STAND) Objection, your Honor. Counsel is leading the witness.

Judge: (LOOK AT DEFENSE) Sustained. Please rephrase your question counselor.

Defense #2: Why was it so important for your club to meet on school property?

Access: We felt like, as Christian students, we had as much right to use the school as students who were interested in photography or scuba diving or whatever.

Defense #2: Do you consider yourself a devout Christian?

Plaintiff #2: (STAND) Objection, your Honor. This line of questioning is irrelevant. (SIT DOWN)

Defense #2: (LOOK AT THE JUDGE) Your honor, how the plaintiff classifies himself/herself as a Christian has a direct bearing on his/her motives in wanting the Christian club at Eastside.

Judge: Overruled. (LOOK AT DEFENSE) I will allow this line of questioning Mr./Ms. Kennedy, but the relevance better become apparent rapidly. Please answer the question.

Access: Yes, like Dr. Brainspector, I am a born-again Christian.

Defense #2: As a devout and born-again Christian, isn't it your responsibility to help spread Christianity?

Access: Yes, but not just as a Christian, as a human being.

Defense #2: Could a Christian club at Eastside help to promote and spread Christianity?

Plaintiff #2: (STAND) Objection again your Honor. This question calls for an opinion. (SIT DOWN)

Judge: Sustained. Please rephrase your question counselor.

Defense #2: Was one of the goals in starting a Christian club at Eastside spreading Christianity?

Access: I don't know if I would call it a goal; but if that happened, wouldn't Eastside be a better place?

Defense #2: Did you want your club to be like all other clubs at Eastside?

Access: Yes, why shouldn't it be?

Defense #2: What kind of arrangements did you make to organize the club before going to Principal Jefferson with the idea?

Access: We wrote a short statement describing the club, how often we would meet, and how the club would benefit the school. We also had arranged for a faculty sponsor, Mrs. Helpful.

Defense #2: You wanted Mrs. Helpful to attend meetings and talk about the Bible with you?

Access: If she wanted to, we wouldn't stop her. It was just a rule that you needed a faculty sponsor, so we got one.

Defense #2: How did you plan on publicizing your meetings?

Access: Over the speaker system, like all other clubs. You know: (PRETEND TO BE MAKING AN ANNOUNCEMENT OVER THE LOUD SPEAKER) "If you are a Christian and are interested in praying and discussing the Bible, come to Mrs. Helpful's room at 3:15."

Defense #2: Thank you. I have no further questions, your Honor. (LOOK AT THE PLAINTIFF) Your witness. (SIT DOWN)

Plaintiff #2: (STAND AND APPROACH THE WITNESS) Mr./Ms. Access, let's go back to your motives in starting a Christian Bible Club at Eastside. Isn't it true that you just wanted to use the school for your interests like other students do?

Access: This seems so simple, I can't believe everybody keeps asking me about this. My parents cannot afford to send me to a private religious school—so I go to a public school that their tax money supports. For nine months a year, I spend the majority of my time, like other students, at school. My friends that are interested in chess, or scuba diving, or almost any other topic can come to school and get together with other students who have similar interests. I am interested in the Bible and Christianity and would like to use the school to get together with other Christians and talk about the Bible.

Plaintiff #2: Isn't it true that you believe that Principal Jefferson and Eastside High School denied your request solely because of the religious speech content at your meetings?

Access: Yes, how else could you feel? Discrimination is discrimination.

Defense #2: (STAND) Objection, your Honor. The witness is expressing an opinion. (SIT DOWN)

Judge: Sustained. The last statement will be stricken from the record. (LOOK AT WITNESS) Please stick to answering the questions.

Plaintiff #2: I would just like to clarify a couple of points that came up during direct examination. The club you are proposing would be both voluntary and non-denominational, correct?

Access: That's right.

Plaintiff: You wouldn't force anybody to come to meetings, correct?

Access: No, how could I?

Plaintiff #2: Mr./Ms. Access, isn't it true that you would characterize the environment at Eastside as hostile to students who are Christians?

Access: Yes.

Plaintiff #2: No further questions, your Honor.

Judge: (LOOK AT WITNESS) You may step down. (LOOK AT THE DEFENSE) Will the defense please call its next witness?

Defense #2: (STAND) The defense calls Dr. Brooke Scholars to the stand. (SIT DOWN)

Scholars: (MOVE TO THE WITNESS STAND AND REMAIN STANDING)

Bailiff: (APPROACH THE WITNESS) Raise your right hand. Do you swear or affirm the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Scholars: I do. (SIT DOWN)

Bailiff: (RETURN TO YOUR SEAT)

Defense #2: (STAND AND APPROACH THE WITNESS) State your name for the Court.

Scholars: My name is Dr. Brooke Scholars.

Defense #2: Dr. Scholars, where do work and in what capacity?

Scholars: I have been a Professor of Education and Law at Indiana University for 33 years. I also serve as editor of *Educational Law*, a leading publication in my field.

Defense #2: What advanced degrees do you hold and from where did you receive them?

Scholars: I have a B.S. in Social Studies Education from Indiana State University; an M.S. and Ph.D. in Curriculum Studies from Columbia University's Graduate School; and a J.D. from Indiana University's School of Law.

Defense #2: Dr. Scholars, what do you consider to be your areas of expertise?

Scholars: My research and writing mostly focus on the areas of curriculum studies and legal issues in education.

Defense #2: Have you authored any books or articles in these areas?

Scholars: Yes, I have written 17 books and 57 articles relating to curriculum studies and/or legal issues in education.

Defense #2: Could you define the term "curriculum" for the Court?

Scholars: The school curriculum includes everything that is related to the mission of the school under its auspices. Of course, all of the required and elective courses are a part of the curriculum. In addition, all of the activities and clubs that are sponsored by the school are also a part of the curriculum.

Defense #2: Let me clarify, Dr. Scholars. Any club or activity that is held at the school is a part of the school's curriculum. Is that your testimony?

Scholars: Yes, if the machinery of the school is being used to pursue some club or activity and is related to the goals and mission of the school, it is a part of the school "curriculum." Even going to the nurse's office is a part of the curriculum. Anything that the school does that serves in some way to teach about its mission, even implicitly, is a part of the curriculum.

Defense #2: Dr. Scholars, are you familiar with the Equal Access Act?

Scholars: Of course, it is my job to be familiar with laws that affect education.

Defense #2: In your opinion, does the Equal Access Act apply to Eastside High School?

Scholars: No. Although Eastside is a public secondary school that receives federal financial assistance, it does not maintain a "limited open forum."

Defense #2: Could you define "limited open forum?"

Scholars: A school has a limited open forum whenever it provides the opportunity for one or more student groups that are not directly tied to the school curriculum access to the school.

Defense #2: Dr. Scholars, are you familiar with the club system at Eastside?

Scholars: Yes.

Defense #2: Your Honor, I ask that this document be marked as "defense's exhibit B." (GIVE COPY TO BAILIFF FOR MARKING) (See Appendix C.)

Bailiff: (MARK THE DOCUMENT WITH AN "B" AND GIVE EXHIBIT TO DEFENSE)

Defense #2: (GIVE COPY TO THE WITNESS) Dr. Scholars, do you recognize the document marked as "defense's exhibit B?"

Scholars: Yes, this is the list and brief description of clubs at Eastside High School.

Defense #2: Your Honor, I offer this list and description of clubs at Eastside High School for admission into evidence as "defense exhibit B."

Judge: You may proceed.

Defense #2: Dr. Scholars, would you please read the names of clubs at Eastside.

Scholars: (READ THE NAMES OF CLUBS)

Defense #2: Are all of these clubs, in your expert opinion, related to the curriculum?

Scholars: Yes, all help to further the total mission of the school.

Defense #2: Could you describe how Chess Club, as an example, relates to the school curriculum or the mission of the school?

Scholars: Chess Club provides opportunities for students to work together to develop the habits and skills of good human relations and citizenship. By participating in Chess Club, students feel more connected to the school, which also serves to promote their interest in other activities of the school and other areas of the curriculum.

Defense #2: Dr. Scholars, in your expert opinion, does the Equal Access Act violate the establishment clause of the Constitution?

Scholars: Yes. If the Constitution means anything, it means that we live in a society where you are free to believe what you want to believe. The establishment clause helps to ensure that freedom by providing that government should be neutral with respect to religion—there should be a wall separating church and state. Secondary students are compelled by the state to attend school. Under the direction of a school are young, impressionable, and captive students that often cannot distinguish between toleration and sponsorship of religious beliefs. The Equal Access Act requires that schools expose this captive audience to religious worship. I don't want to send my children to a public school and worry about the possibility of other students persuading them to believe like they do. Matters of conscious are best left to the family, not to the state.

Defense #2: In your opinion, would the Equal Access Act pass the three-part *Lemon* test?

Scholars: No, the Act would certainly fail the second and third prongs of the test. After studying the congressional record, it is possible to assume that Congress did have a secular legislative purpose in passing the Act. However, in practice, the Act has the primary effect of advancing religion and fosters an excessive government entanglement with religion. The Act provides for the use of the school and its machinery for student prayer and religious discussion and for faculty sponsorship of student groups that pray. Also, the language of the Act is overly broad.

Defense #2: What do you mean by overly broad?

Scholars: The Act says that schools cannot discriminate because of the "religious, political, philosophical, or other content" of student speech. If the Act applies to Eastside and is constitutional, then if other students at Eastside want to start a Skinheads Club or some other kind of hate group, Eastside would be powerless to stop them.

Plaintiff #2: (STAND) Objection, your Honor. This testimony is irrelevant to the issues in the case. (SIT DOWN)

Judge: Overruled. The testimony does relate to your freedom of expression claim, counselor.

Defense #2: Nothing further, your Honor. (LOOK AT PLAINTIFF) Your witness. (SIT DOWN)

Plaintiff #2: Dr. Scholars, isn't it true you consider yourself an atheist?

Defense #2: Objection, your Honor. This line of questioning is irrelevant.

Judge: Overruled. (LOOK AT WITNESS) Please answer the question, Dr. Scholars.

Scholars: No, an agnostic.

Plaintiff #2: Isn't it also true that you testified before a congressional committee arguing against the passage of the Equal Access Act?

Scholars: Yes, and so did many other people concerned about a free society.

Plaintiff #2: Isn't it true that following your definition of "curriculum," the Equal Access Act would not apply to a single public secondary school in the United States?

Scholars: I don't know about every public school in the United States.

Plaintiff #2: Can you identify even one secondary public school that receives federal financial assistance and maintains a limited open forum as the Act provides?

Scholars: No.

Plaintiff #2: So Congress passed a law that doesn't really apply to anyone?

Defense #2: Objection, your Honor.

Plaintiff #2: I'll withdraw the question, your Honor. Dr. Scholars, you testified during direct examination that the establishment clause means that government should be neutral with respect to religion, is that correct?

Scholars: Yes.

Plaintiff #2: Doesn't that also mean that the state should not create an environment that is hostile to or chills religious expression?

Scholars: Of course, the free exercise of religion and free speech clauses of the First Amendment guarantee that as well.

Plaintiff #2: Isn't it true, that public schools that deny access to their facilities to student religious groups, are in fact violating students' rights to free exercise of religion and free expression?

Scholars: No, not when balanced against the potential to establish religion in a public school. The impressionability of the students in the secondary school environment tips the balance in favor of protecting against potential establishment clause violations.

Plaintiff #2: But is it true that schools that do not allow access to student religious groups are in fact limiting students free exercise of religion and free expression rights?

Scholars: Yes, but the limitations need to be considered. . .

Plaintiff #2: Thank you, Dr. Scholars. Nothing further, your Honor.

Judge: (LOOK AT WITNESS) You may step down. (LOOK AT THE DEFENSE) Will the defense please call its next witness?

Defense #2: (STAND) Your Honor, the defense rests. (SIT DOWN)

Judge: (LOOK AT THE PLAINTIFF) Does the plaintiff wish to make a closing statement?

Plaintiff #2: We do, your Honor.

Judge: (LOOK AT PLAINTIFF) You may proceed.

Plaintiff #2: (APPROACH THE JURY) Ladies and Gentlemen of the jury, the plaintiff simply asks you to require Eastside High School to abide by the Constitution and the laws of the United States. During the trial, you have heard evidence that the Equal Access Act does apply to Eastside High School. Principal Jefferson testified that Eastside is a public secondary school that receives federal financial assistance. Dr. Brainspector, an expert on the constitutional rights of children, testified that Eastside has a "limited open forum," another requirement of the Act. By denying Kim the opportunity to use the school for a Christian Bible Club, the school violated the Act.

You also heard testimony from Dr. Brainspector that a secondary school that has a limited open forum and denies access to its facilities by religious groups violates students' rights to freedom of expression, freedom of association, and free exercise of religion. In fact, the Supreme Court has ruled that such a denial was unconstitutional in *Widmar v. Vincent*.

Finally, throughout the course of the trial you have heard testimony that the Equal Access Act and a public secondary school that has a policy allowing access to its facilities by a religious student organization passes the three-part *Lemon* test. The Act and such a policy do not have the primary effect of advancing religion; in fact, not allowing access to a secondary public school by a student-initiated religious group actually inhibits religious expression. In addition, neither the Act nor a school policy of toleration toward religious expression, excessively entangle government and religion. The establishment clause does not bar all governmental contact with religion.

Although you have heard evidence on both sides of these issues, the weight of the evidence is on the side of the plaintiff. All the plaintiff asks is for you to require Eastside High School to allow access to its facilities to a Christian Bible Club. Such a requirement is consistent with the Constitution and the Equal Access Act.

Judge: (LOOK AT THE DEFENSE) Does the defense wish to make a closing argument?

Defense #2 (STAND) We do, your Honor. (APPROACH THE JURY) Ladies and gentlemen of the jury, opposing counsel is at least right about one thing—you need to do what is right in this case. The weight of the evidence will require you to rule in favor of Eastside High School and the defense.

The Equal Access Act does not apply to Eastside. You have heard testimony from Dr. Brooke Scholars, an expert in curriculum studies, that all of the clubs at Eastside are directly related to the school's curriculum. In short, Eastside does not maintain a "limited open forum" and the Equal Access Act does not apply.

Even if it did apply, the Equal Access Act is unconstitutional. Using teachers and the public school machinery to support a religious club has the primary effect of advancing religion and unnecessarily entangles government with religion. Ms. Access really wants the school's endorsement of prayer and Christianity. Prayer in the public schools was

ruled unconstitutional by the Supreme Court during the early part of the 1960s in *Abington Township v. Schempp* and *Engel v. Vitale.* We do not need to return to the days when parents had to worry about exposing their children to religious beliefs in the public schools.

A key issue in this case is why Eastside denied access to Ms. Access' Christian Bible Club. Principal Jefferson provided clear testimony on this issue. Eastside is not trying to circumvent the Constitution; rather, the school is attempting to live up to the establishment clause that bars the union of church and state. To rule in favor of the Eastside School District and Principal Jefferson is to rule in favor of the United States Constitution and a free society.

Finally, *Widmar v. Vincent* is not an appropriate precedent for this case. Although it is true that the Supreme Court ruled in *Widmar* that denying access to a religious student group was unconstitutional, the students in that case were older and not compelled to attend like the majority of students at Eastside.

Ladies and gentlemen of the jury, all the defense asks of you is to uphold the important principle of the Constitution and a free society that bars governmental establishments of religion. You must do what is right and decide in favor of the defense. (SIT DOWN)

Judge: (LOOK AT THE JURY) You have heard the evidence. Now it is your civic duty to decide, by preponderance of the evidence, two main questions in this case. First, you must decide whether the defendants, Eastside School District and Principal Jefferson, are guilty of violating the Equal Access Act. Second, you must decide if the Equal Access Act violates the establishment clause of the Constitution. Please go with the bailiff to the jury room and make your decision. When you have decided a unanimous verdict, you will return and inform the Court.

Bailiff: (STAND) All rise.

Judge: (STAND AND EXIT THE COURTROOM)

Jury: (FOLLOW THE BAILIFF TO THE JURY ROOM)

Judge: (AFTER THE JURY HAS LEFT) Please be seated.

AFTER THE JURY IS READY TO DELIVER ITS VERDICT

Bailiff: (STAND) All rise.

Judge: Please be seated. (LOOK AT JURY) Have you reached a verdict?

Head Juror: (STAND) Yes, your Honor.

Judge: What is the verdict?

Head Juror: Your Honor, we find the defendant GUILTY/NOT GUILTY of violating the Equal Access Act and we find the Equal Access Act CONSTITUTIONAL/UNCONSTITUTIONAL with regard to the establishment clause of the First Amendment.

Judge: The defendant has been found GUILTY/NOT GUILTY of violating the Equal Access Act and the Equal Access Act has been ruled CONSTITUTIONAL/UNCONSTITUTIONAL. United States District Court for the state of (name of state) is adjourned.

Instructions for the Jury: *Kim Access v. Eastside Community Schools*

In this case, you must decide two main questions, one statutory and one constitutional. First, you must decide if the Equal Access Act applies to Eastside High School. Second, does the Equal Access Act nonetheless violate the establishment clause of the First Amendment? Throughout the trial, you have heard excellent arguments on both sides of these and other relevant issues. To help you answer these questions, you should consult the following.

QUESTIONS TO CONSIDER:

Part 1. Does the Equal Access Act apply to Eastside High School?

A. Is Eastside High School a public secondary school that receives federal financial assistance?
__yes __no
B. Does Eastside High School maintain a limited open forum; do they have at least one "non-curriculum related" club?
__yes __no

Part 2. Does the Equal Access Act violate the establishment clause of the First Amendment?

A. Does the statute have a secular (i.e., not religious) legislative purpose?
__yes __no
B. Does the statute's principal or primary effect advance or inhibit religion?
__yes __no
C Does the statute foster an excessive government entanglement with religion?
__yes __no

If you answered "yes" to both questions in Part One, you should rule that the Equal Access Act does apply to Eastside High School. If you answered "no" to either of the questions in Part One, you should rule that the Equal Access Act does not apply to Eastside High School. If you answered "yes" to A and "no" to B and C in Part Two you should rule the Equal Access Act does not violate the establishment clause. However, if you answered "no" to A or "yes" to either B or C, you should rule that the Equal Access Act violates the establishment clause and is thus unconstitutional.

Appendix A: The Equal Access Act (20 U.S.C. §§4071-74)

(a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related students groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such a school uniformly provides that–
  (1) the meeting is voluntary and student-initiated;
  (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
  (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
  (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
  (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof–
  (1) to influence the form or content of any prayer or other religious activity;
  (2) to require any person to participate in prayer or other religious activity;
  (3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
  (4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
  (5) to sanction meetings that are otherwise unlawful;
  (6) to limit the rights of groups of students which are not of a specified numerical size; or
  (7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

Appendix B: Eastside School Board Policy 5610

The Board of Education regards student clubs and organizations as a vital part of the total education program to develop citizenship, wholesome attitudes, good human relations, knowledge and skills.

School-sponsored clubs and organizations are those directly under the control of the school administration, and shall have faculty sponsorship. The Superintendent shall establish operational guidelines for clubs and organizations which shall function for the welfare and the best interest of the students and the school.

Such clubs and organizations shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race, color, creed, sex, or political belief.

Appendix C: Student Clubs at Eastside High School

Chess Club—This activity is for those interested in playing chess. Opportunities to play are held after school throughout the school year.

Future Medical Assistants (FMA)—This is a club designed for students with an interest in pursuing any area of medicine. The organization assists in securing blood donations from individuals at Eastside High School for the Red Cross. Meetings are held to inform the membership about opportunities in the medical field. Members are accepted at the beginning of school each year.

National Honor Society—Eastside Honor Society is a chapter of the national organization and is bound by its rules and regulations. It is open to seniors who are in the upper 15% of their class. Eastside in practice and by general agreement of the local chapter has inducted only those juniors in the upper 7% of their class. The selection is made not only upon scholarship but also character, leadership, and service. A committee meets and selects those students who they believe represent the high qualities of the organization. Induction into NHS is held in the spring of each year.

Outdoor Education—This activity is an opportunity for interested students to be involved in the elementary school Outdoor Education Program. High school students are used as camp counselors and leaders for this activity. Students are solicited to help work prior to the fall and spring Outdoor Ed Program.

Photography Club—This is a club for the student who has an interest and/or ability in photography. Students have an opportunity to take photos of school activities. A dark room is provided for the students' use. Membership in this organization begins in the fall of each school year.

Subsurfers—Is a club designed for students interested in learning about skin and scuba diving and other practical applications of that sport. Opportunities in the classroom and in our pool are made available for students involved in this activity. Membership is solicited in the fall and spring of each year.

Relevant U.S. Supreme Court Decisions

Key Holdings from the Supreme Court Decision

The case of *Kim Access v. Eastside Community Schools* is based upon the U.S. Supreme Court case, *Westside Community Board of Education v. Mergens* (1990). An abstract of that case, taken directly from the Court's decision, is presented below. Do you agree or disagree with the Court's decision in *Mergens*? How does your decision compare with the Supreme Court's? Do you prefer some justices' arguments to others?

Westside Community Board of Education v. Mergens
496 U.S. 226
No. 88-1597
Argued: January 9, 1990
Decided: June 4, 1990

The Facts of the Case:

Westside High School, a public secondary school that receives federal financial assistance, permits its students to join, on a voluntary basis, a number of recognized groups and clubs, all of which meet after school hours on school premises. Citing the establishment clause and a School Board policy requiring clubs to have faculty sponsorship, petitioner school officials denied the request of respondent Mergens for permission to form a Christian club that would have the same privileges and meet on the same terms and conditions as other Westside student groups, except that it would have no faculty sponsor. After the Board voted to uphold the denial, respondents, current and former Westside students, brought suit seeking declaratory and injunctive relief. They alleged, *inter alia*, that the refusal to permit the proposed club to meet at Westside violated the Equal Access Act, which prohibits public secondary schools that receive federal assistance and that maintain a "limited open forum" from denying "equal access" to students who wish to meet within the forum on the basis of the "religious, political, philosophical, or other content" of the speech at such meetings. In reversing the District Court's entry of judgment for petitioners (the school officials), the Court of Appeals held that the Act applied to forbid discrimination against respondents' proposed club on the basis of its religious content, and that the Act did not violate the establishment clause. The U.S. Supreme Court affirmed this judgement.

Key Holdings:

Part I: Does the Equal Access Act apply to Westside High School and did Westside violate the Act?

(a) The Act provides, among other things, that a "limited open forum" exists whenever a covered school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises." Its equal access obligation is therefore triggered even if such a school allows only one "noncurriculum related" group to meet.

(b) Although the Act does not define the crucial phrase "noncurriculum related student group," that term is best interpreted in the light of the Act's language, logic, and nondiscriminatory purpose, and Congress' intent to provide a low threshold for triggering the Act's requirements, to mean any student group that does not directly relate to the body of courses offered by the school. A group directly relates to a school's curriculum if the group's subject matter is actually taught, or will soon be taught, in a regularly offered course; if that subject matter concerns the body of courses as a whole; or if participation in the group is required for a particular course or results in academic credit. Whether a specific group is "noncurriculum related" will therefore depend on the particular school's curriculum, a determination that would be subject to factual findings well within the competence of trial courts to make.

(c) Westside's existing student clubs include one or more "noncurriculum related student group[s]" under the foregoing standard. For example, Subsurfers, a club for students interested in scuba diving, is such a group, since its subject matter is not taught in any regularly offered course; it does not directly relate to the curriculum as a whole in the same way that a student government or similar group might; and participation in it is not required by any course and does not result in extra academic credit. Thus, the school has maintained a "limited open forum" under the Act and is prohibited from discriminating, based on the content of the students' speech, against students who wish to meet on school premises during noninstructional time.

(d) Westside's denial of respondents' request to form a religious group constitutes a denial of "equal access" to the school's limited open forum. Although the school apparently permits respondents to meet informally after school, they seek equal access in the form of official recognition, which allows clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, public address system, and annual Club Fair. Since denial of such recognition is based on the religious content of the meetings respondents wish to conduct within the school's limited open forum, it violates the Act.

Part II: Is the Equal Access Act a violation of the establishment clause of the First Amendment?

(a) Because the Act on its face grants equal access to both secular and religious speech, it meets the secular purpose prong of the [*Lemon*] test.

(b) The Act does not have the primary effect of advancing religion. There is a crucial difference between government and private speech endorsing religion, and, as Congress recognized in passing the Act, high school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. Moreover, the Act expressly limits participation by school officials at student religious group meetings and requires that such meetings be held during "noninstructional time," and thereby avoids the problems of the students' emulation of teachers as role models and mandatory attendance requirements that might otherwise indicate official endorsement or coercion. Although the possibility of student peer pressure remains, there is little if any risk of government endorsement or coercion where no formal classroom activities are involved and no school officials actively participate.

(c) Westside does not risk excessive entanglement between government and religion by complying with the Act, since the Act's provisions prohibit faculty monitors from participating in, nonschool persons from directing, controlling, or regularly attending, and school "sponsorship" of, religious meetings. Indeed, a denial of equal access might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which it might occur.

The judgment of the Eighth Circuit Court of Appeals is affirmed.

Concurring Opinions, Justice Kennedy and Justice Scalia:

"Agreeing that the Act does not violate the establishment clause, concluded that, since the accommodation of religion mandated by the Act is a neutral one, in the context of this case it suffices to inquire whether the Act violates either of two principles. First, the government cannot give direct benefits to religion in such a degree that it in fact establishes a state religion or religious faith, or tends to do so. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 655. Any incidental benefits that accompany official recognition of a religious club under the Act's criteria do not lead to the establishment of religion under this standard. See *Widmar v. Vincent*, 454 U.S. 263, 273-274. Second, the government cannot coerce any student to participate in a religious activity. Cf. County of Allegheny, *supra*, at 659. The Act also satisfies this standard, since nothing on its face or in the facts of this case demonstrates that its enforcement will pressure students to participate in such an activity."

Dissenting Opinions, Justice Stevens:

"The dictionary is a necessary, and sometimes sufficient, aid to the judge confronted with the task of construing an opaque Act of Congress. In a case like this, however, I believe we must probe more deeply to avoid a patently bizarre result. Can Congress really have intended to issue an order to every public high school in the Nation stating, in substance, that if you sponsor a chess club, a scuba diving club, or a French club - without having formal classes in those subjects - you must also open your doors to every religious, political, or social organization, no matter how controversial or distasteful its views may be? I think not. A fair review of the legislative history of the Equal Access Act discloses that Congress intended to recognize a much narrower forum than the Court has legislated into existence today."

Recent and Related United States Supreme Court Cases

Agostini v. Felton
Argued: April 15, 1997
Decided: June 23, 1997

The Facts of the Case:

Sensing a shift in the Supreme Court's interpretation of the establishment clause, the New York City School Board, which had been the subject of a permanent injunction in *Aguilar v. Felton* (1985), sought to have that case reopened so it could begin to use federal money to provide remedial education to students who qualified. The suit, brought by a New York parochial school board and some of its students' parents, challenged a District Court ruling upholding the twelve-year-old decision of *Aguilar v. Felton*. In *Aguilar* the Court prohibited public school teachers from teaching for limited and specific purposes in parochial schools as a violation of the establishment clause.

The Decision:

The Court overruled its decision in *Aguilar v. Felton* (1985) and ruled such a scheme was constitutionally permissible. The Court held that there was no evidence to support its former presumption that the entrance of public school teachers into parochial schools will inevitably lead to the formation of a state-sponsored religion. The New York program that sent public school teachers into parochial schools to provide remedial instruction, did not provide parochial schools with any incentive to establish religion in order to attract public school teachers. The Court held that under its new view, only those policies that generate an excessive conflict between church and state will be deemed to violate the establishment clause. This decision also overturned *Grand Rapids School District v. Ball* (1985).

Rosenberger v. University of Virginia
515 U.S. 819
Argued: March 1, 1995
Decided: June 29, 1995

The Facts of the Case:

Ronald W. Rosenberger, a University of Virginia student, requested $5,800 from a student activities fund at the University to subsidize the publishing costs of *Wide Awake: A Christian Perspective at the University of Virginia*. The University of Virginia refused to provide funding. The University denied Rosenberger's request because the publication "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality," which was prohibited by University guidelines.

The Decision:

A divided Court held that the University's denial of funding, due to the content of speech, amounted to viewpoint discrimination. The Court reasonsed that no matter how scarce University publication funding may be, if it chooses to promote any speech, it must promote all forms equally. The Court rejected

potential establishment clause concerns because the University's program had been neutral with respect to religion. Providing funding to a religious publication, on the same basis it does other publications, does not violate the establishment clause. The Court concluded by stating that the University could not stop all funding of religious speech while continuing to fund an atheistic publication.

Board of Education Kiryas Joel Village School v. Grumet
512 U.S. 687
Argued: March 30, 1994
Decided: June 27, 1994

The Facts of the Case:

In 1989, the New York legislature intentionally designed school district boundaries consistent with the boundaries of the Village of Kiryas Joel. The Village of Kiryas Joel is a religious enclave of Satmar Hasidim whose occupants practice a form of Orthodox Judaism. Tax payers and the Association of State School Boards embarked on a lawsuit claiming that the statute created a school district that limited access only to residents of Kiryas Joel.

The Decision:

In a 6-to-3 decision, the Court held that the statute's purpose was to exclude all but those who lived in and practiced the village enclave's extreme form of Judaism. The scheme violated the establishment clause's requirement that states maintain a neutral position with respect to religion. By clearly creating a school zone which excluded those who were non-religious and/or did not practice Satmar Hasidism, the state demonstrated a preference for one religion over another or for religion over non-religion in general.

Lamb's Chapel v. Center Moriches School District
508 U.S. 385
Argued: February 24, 1993
Decided: June 7, 1993

The Facts of the Case:

Consistent with a New York law authorizing schools to regulate the after-hour use of school property and facilities, Center Moriches School District prohibited the use of its property by any religious group. Lamb's Chapel was repeatedly denied access by the school to the school's facilities for an after-hours religious-oriented film series on family values and child rearing. The Chapel brought suit against the School District in federal court.

The Decision:

By a unanimous vote, the Supreme Court ruled that such a denial was unconstitutional. First, the District violated freedom of speech by refusing the Chapel's request to show movies on school premises solely because of the religious content of the films. Although non-public schools are permitted under New York law to restrict access to their premises based on content or speaker identity, such restrictions must be reasonable and "viewpoint neutral." By refusing access only to a religious perspective, the district violated the standard of reasonableness and neutrality. Second, permitting the Chapel to use the district's premises would not have violated the establishment clause. Public access to school facilities by religious groups after school hours is constitutionally permissible.

CHAPTER FIVE
Annotated Table of Supreme Court Cases

The following table of Supreme Court cases are ones that have been mentioned in the pages of this volume. The cases are listed in alphabetical order and include a citation as well as a brief synopsis of the Supreme Court's ruling.

Supreme Court decisions are officially published by the U.S. Government Printing Office in a series of volumes, *United States Reports*. The citations that follow refer the reader to the *United States Reports* whenever possible. To obtain a complete copy of any Supreme Court decision, readers may go to the library and locate the appropriate volume and page number of the *United States Reports* or look up the case in the index of one of the other print publications of Supreme Court decisions (i.e., *United States Law Week, Supreme Court Reporter,* or *United States Supreme Court Report, Lawyers' Edition*). The volume is the number that precedes "U.S." in *United States Reports* citations, whereas the page number follows "U.S." For example, in *Abington Township v. Schempp*, 374 U.S. 203 (1963), readers would locate volume 374 of the *United States Reports* and turn to page 203.

Many Supreme Court decisions, including those in the following table, may be obtained electronically. To obtain the *full text* of many recent as well as historically significant Supreme Court decisions via the World Wide Web, readers may go to the following web sites:

FedWorld/FLITE (Federal Legal Information Through Electronics) Supreme Court Decisions—
http://www.fedworld.gov/supcourt/index.htm

FindLaw Internet Legal Resources—http://www.findlaw.com/

Legal Information Institute—http://fatty.law.cornell.edu/

United States Supreme Court Plus—
http://www.usscplus.com/

To obtain *brief accounts* of many recent as well as historically significant Supreme Court decisions, readers may go to the following web site:

Oyez: A U.S. Supreme Court Database—
http://court.it-services.nwu.edu/oyez/

The following summaries were adapted from these web sites and/or from the *United States Reports.*

***Abington Township v. Schempp*, 374 U.S. 203 (1963)**
Did the Pennsylvania law and Abington's policy, requiring public school students to read passages from the Bible or recite the Lord's Prayer, violate the religious freedom of students as protected by the First Amendment? These policies, the Court ruled, violated both the free exercise clause and the establishment clause of the First Amendment since the readings and recitations were essentially religious ceremonies and were "intended by the state to be so." The Court also held that the ability of a parent to excuse a child from these ceremonies by a written note was irrelevant since it did not prevent the school's actions from violating the establishment clause.

***Abrams v. United States*, 250 U.S. 616 (1919)**
Does the Espionage Act of 1917, which makes it unlawful to incite resistance to the war effort or curtail production of war materials, violate the free speech clause of the First Amendment? The Act is constitutional and the defendants' convictions are affirmed. In Justice Clarke's majority opinion, the leaflets are an appeal to violent revolution, a call for a general strike, and an attempt to curtail production of munitions. Thus, the leaflets had a tendency to encourage war resistance and to curtail war production. Justices Holmes and Brandeis dissented. Their dissent argued the necessary intent to incite violent or unlawful behavior had not been shown. These views became a classic libertarian pronouncement on freedom of speech.

***Adamson v. California*, 332 U.S. 46 (1947)**
Is a defendant's Fifth Amendment right not to bear witness against himself applicable in state courts and protected by the Fourteenth Amendment's due process clause? A divided Court found that the Fourteenth Amendment's due process clause did not extend to defendants a Fifth Amendment right not to bear witness against themselves in state courts. Relying on past decisions such as *Twining v. New Jersey* (1908), which explicitly denied the application of the due process clause to the right against self-incrimination, and *Palko v. Connecticut* (1937), Justice Reed argued that the Fourteenth Amendment did not incorporate all of the privileges and immunities of the first ten amendments to individuals at the state level. In a lengthy dissent, Justice Black argued for the absolute and complete application of the Bill of Rights to the states. The Court has continuously rejected Justice Black's argument for total incorporation and has chosen to selectively incorporate provisions of the Bill of Rights on a case by case basis. The specific decision in this case was overturned by the Court in *Malley v. Hogan* (1964).

***Agostini v. Felton* (1997)**
Do public school teachers violate the establishment clause when they provide instruction in parochial schools? The

Court overruled its decision in *Aguilar v. Felton* (1985) and ruled such a scheme was constitutionally permissible. The Court held that there was no evidence to support its former presumption that the entrance of public school teachers into parochial schools will inevitably lead to the formation of a state-sponsored religion. The New York program, which sent public school teachers into parochial schools to provide remedial instruction, did not provide parochial schools with any incentive to establish religion in order to attract public school teachers. The Court held that under its new view, only those policies that generate an excessive conflict between church and state will be deemed to violate the establishment clause. This decision also overturned a portion of the Court's ruling in *Grand Rapids School District v. Ball* (1985).

***Aguilar v. Felton*, 473 U.S. 402 (1985)**

Did New York City's policy of using Title I funds to pay salaries of parochial school teachers violate the establishment clause of the First Amendment? Acknowledging that the efforts of the City of New York were well-intentioned, the Court found that the funding scheme violated the establishment clause. Relying on its decision in *Grand Rapids School District v. Ball* (1985), the Court held that the administration of aid in parochial schools would assist in furthering the religious mission of those schools. New York's program "would require a permanent and pervasive presence" of public officials in religious schools. Thus, the Court ruled the program excessively entangles government and religion and is a violation of the establishment clause. This ruling was overturned by the Court in *Agostini v. Felton* (1997).

***Barron v. Baltimore*, 32 U.S. 243 (1833)**

Does the Fifth Amendment deny states the right to take private property for public use without justly compensating the property's owner? The Court announced its decision in this case without hearing the arguments of the City of Baltimore. Writing for a unanimous Court, Chief Justice John Marshall found that the takings clause of the Fifth Amendment was specifically intended to limit the power of the national government. Noting the intent of the framers and the development of the Bill of Rights as an exclusive check on the national government, Marshall argued that the Supreme Court had no jurisdiction in this case since the Fifth Amendment was not applicable to the states. This ruling has been overturned by the Court's 20th-century interpretations of Section 1 of the Fourteenth Amendment.

***Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)**

Does the First Amendment prevent a school district from disciplining a high school student for giving a lewd speech at a high school assembly? The Court held that it was constitutionally permissible for the school to prohibit the use of vulgar and offensive language. Chief Justice Burger distinguished between political speech that the Court previously had protected in *Tinker v. Des Moines Independent Community School District* (1969) and the implicit sexual content of Fraser's message at the assembly. Burger reasoned that the First Amendment did not prohibit schools from prohibiting vulgar and lewd speech since such speech was inconsistent with the "fundamental values of public school education."

***Board of Education Kiryas Joel Village School v. Grumet*, 512 U.S. 687 (1994)**

Did a 1989 statute that intentionally drew school district boundaries in accordance with the Village of Kiryas Joel, the religious enclave of Satmar Hasidism, violate the establishment clause? In a 6-to-3 decision, the Court held that the statute's purpose was to exclude all but those who lived in and practiced the village enclave's form of Orthodox Judaism. This scheme violated the establishment clause's requirement that states maintain a neutral position with respect to religion. By clearly creating a school zone which excluded those who were non-religious and/or did not practice Satmar Hasidism, the state demonstrated a preference for one religion over another or for religion over non-religion in general.

***Boyd v. United States*, 116 U.S. 616 (1886)**

Did the government, by requiring George and Edward Boyd to turn over private papers against their will, violate the Fourth Amendment's protections against unreasonable searches and seizures? The Court ruled that such a requirement constituted an unreasonable search within the context of the Fourth Amendment. In addition, the Court held that a close relationship existed between the Fourth Amendment's prohibition against unreasonable searches and seizures and the Fifth Amendment's prohibition against self-incrimination. Thus, a search in violation of the Fourth Amendment cannot be admitted into evidence because of the Fifth Amendment.

***Brandenburg v. Ohio*, 395 U.S. 444 (1969)**

Did Ohio's law, prohibiting public speech that advocates various illegal activities, violate Brandenburg's right to free speech as protected by the First and Fourteenth Amendments? The Court held that the Ohio law violated Brandenburg's right to free speech. Using a two-pronged test to evaluate the Ohio law, the Court ruled that speech can be prohibited if it is (1) "directed at inciting or producing imminent lawless action;" and (2) it is "likely to incite or produce such action." The Ohio statute outlawed certain types of speech while ignoring whether or not the speech would actually incite imminent lawless action. The failure to make this distinction rendered the law overly broad and in violation of the First Amendment.

California v. Greenwood, 486 U.S. 35 (1988)
Did the warrantless search and seizure of Greenwood's garbage violate the Fourth Amendment? In a 6-2 decision the Court held that garbage placed at the curbside is unprotected by the Fourth Amendment. Maintaining that there was no reasonable expectation of privacy for trash on public streets "readily accessible to animals, children, scavengers, snoops, and other members of the public," the Court found no violation of the Fourth Amendment's prohibition against unreasonable searches and seizures.

Cantwell v. Connecticut, 310 U.S. 296 (1940)
Did Connecticut's solicitation statute violate the Cantwells' First Amendment free speech or free exercise rights? In a unanimous decision, the Court held that the statute, by requiring the issuance of certificates to people intending to solicit money for religious causes, allowed local officials broad authority to determine which causes were religious and which ones were not. Thus, the statute violated the First and Fourteenth Amendments to the Constitution. The Court held that although states may pass general regulations on solicitation, they could not single out one group as Connecticut had.The Cantwells' message, while offensive to many, did not contain any threat of "bodily harm" and was protected religious speech.

Carroll v. United States, 262 U.S. 132 (1925)
Did the warrantless search of Carroll's automobile violate the Fourteenth Amendment's protection against unreasonable searches and seizures? The Court ruled that the warrantless search of the car was constitutional establishing the "automobile exception" to the general warrant requirement. Justice Taft reasoned that the car and everything in it could have been driven away while a warrant was being obtained.

Chandler v. Miller, (1997)
Did Georgia's statute, requiring drug testing of political candidates, violate the Fourth Amendment's guarantee against illegal search and seizures? In an 8-to-1 opinion, the Court stressed that although the Fourth Amendment generally prohibits officials from conducting searches and seizures without individualized suspicion, there does exist a narrowly defined category of permissible suspicionless searches and seizures. Georgia's statute, however, did not fall into this exceptional category since it failed to show why its desire to avoid drug users in its high political offices should outweigh candidates' privacy interests. The Court concluded that even if such a problem did exist, the affected officials would most likely not perform the kind of high-risk, safety sensitive tasks (e.g., operating a train) which might justify the statute's proposed incursion on their individual rights.

Dred Scott v. Sandford, 60 U.S. 393 (1856)
Was Dred Scott free or slave and was the Missouri Compromise constitutional? Dred Scott was a slave. Under Articles Three and Four, argued Chief Justice Taney, no one but a citizen of the United States could be a citizen of a state. Taney reached the conclusion that no person descended from an American slave had ever been a citizen for Article Three purposes. The Court then held the Missouri Compromise unconstitutional by the due process clause of the Fifth Amendment, hoping to end the slavery question once and for all. The Missouri Compromise unconstitutionally denied people, according to the Taney Court, of their property (slaves). This was the Court's first use of substantive due process in striking down a federal law. Justice Benjamin Curtis' dissent in this case became the basis for the Fourteenth Amendment's provisions that overturned the Court's decision in this case.

Edwards v. Aguillard, 482 U.S. 578 (1987)
Did the Louisiana law, which mandated the teaching of "creation science" along with the theory of evolution, violate the establishment clause of the First Amendment? The Court held that the law violated the Constitution. Using the three-pronged test that the Court had developed in *Lemon v. Kurtzman* (1971) to evaluate potential violations of the establishment clause, Justice Brennan argued that Louisiana's law failed all three prongs of the test. First, it was not enacted to further a clear secular purpose. Second, the primary effect of the law was to advance the viewpoint that a "supernatural being created humankind," a central tenet of many religions. Third, the law entangled the interests of church and state by seeking "the symbolic and financial support of government to achieve a religious purpose."

Engel v. Vitale, 370 U.S. 421 (1962)
Does the reading of a nondenominational prayer at the start of the school day violate the establishment clause of the First Amendment? Neither the prayer's non-denominational character nor its voluntary character save it from unconstitutionality. The Court ruled that by providing the prayer, New York officially endorsed religion and therefore violated the establishment clause. This was the first in a series of cases in which the Court used the establishment clause to eliminate religious activities of all sorts, which had traditionally been a part of public ceremonies. The Court's interpretation of the establishment clause remains unpopular with many Americans.

Everson v. Board of Education, 330 U.S. 1 (1947)
Did a New Jersey statute that allowed for the reimbursement of money used to send children to school (including religious schools) on public transportation violate the establishment clause of the First Amendment? A divided Court held that the law did not violate the Constitution. Justice

Black argued that services like busing and police and fire protection for parochial schools are "separate and so indisputably marked off from the religious function" that for the state to provide them would not violate the establishment clause. The law did not financially support parochial schools, nor did it support them directly in anyway. The law was intended to assist parents of all religions with getting their children to school. This case was the first instance of the Court's application of the First Amendment's establishment clause to the states by way of the liberty protected by the due process clause of the Fourteenth Amendment.

Gitlow v. New York, 268 U.S. 652 (1925)
Is the New York law, that allows the state to punish individuals that advocate the overthrow of the government, an unconstitutional violation of the free speech clause of the First Amendment? And, does the First Amendment apply to the states? By virtue of the liberty protected by due process of the Fourteenth Amendment, states cannot infringe upon freedom of speech. A state may forbid both speech and publication if they have a tendency to result in action dangerous to public security, even though such utterances create no clear and present danger. This rationale of the majority has sometimes been called the "dangerous tendency" test. A state legislature, however, may decide that an entire class of speech is so dangerous that it should be prohibited. If these restrictions are not unreasonable, the defendant will be punished even if his/her speech created no danger at all.

Goss v. Lopez, 419 U.S. 565 (1975)
Did the school, by suspending the students without preliminary hearings, violate the students' due process rights guaranteed by the Fourteenth Amendment? In a 5-to-4 decision, the Court ruled that Ohio could not deny the opportunity to an education "on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct ha[d] occurred." The Court held that attending school is an interest that qualifies for protection through the due process clause of the Fourteenth Amendment. As such, it is an interest that could not be taken away without minimum procedures required by the clause. The Court found that students facing suspension of 10 days or less should at a minimum be given notice and afforded some kind of hearing.

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)
Did the principal's prior restraint of articles from the school publication about teenage pregnancy and the effects of divorce on students violate the students' rights under the First Amendment? In a 5-to-3 decision, the Court held that the First Amendment did not require schools to affirmatively promote particular types of student speech under its auspices. Furthermore, the Court ruled that schools retained the right to refuse to sponsor speech that was "inconsistent with 'the shared values of a civilized social order.'" The First Amendment allowed educators editorial control over the content of student speech so long as their actions were "reasonably related to legitimate pedagogical concerns." The actions of the principal met this test.

Hurtado v. California, 110 U.S. 516 (1884)
Does the Fifth Amendment right to a grand jury indictment apply to the states through the Fourteenth Amendment's due process clause? The Court said "no" and held that any legal proceeding that protects liberty and justice is due process. Justice Mathew's majority opinion reasoned that the Constitution cannot be locked into static conceptions of due process and that states could base criminal proceedings on information rather than grand jury indictments. The Court also took the position that nothing in the Constitution is superfluous. Since the Fifth Amendment contains both a guarantee of grand jury proceedings and a guarantee of due process, the latter cannot embrace the former.

Katz v. United States, 389 U.S. 347 (1967)
Is evidence, obtained through the use of wiretaps, protected from being used as evidence against defendants under the Fourth Amendment? The Court ruled that Katz was entitled to Fourth Amendment protection for his telephone conversations and that a physical intrusion into the area he occupied was unnecessary to trigger the Amendment. "The Fourth Amendment protects people, not places," wrote Justice Potter Stewart for the Court. A concurring opinion by Justice John Marshall Harlan introduced the idea of a "reasonable expectation of privacy" as a threshold standard in Fourth Amendment cases. In other words, people are protected from unreasonable searches and seizures only where they have a reasonable expectation of privacy.

Ladue v. Gilleo, 512 U.S. 43 (1994)
Does the Ladue ordinance that banned window signs violate Gilleo's right to free speech as protected by the First Amendment? While acknowledging Ladue's police power to minimize visual clutter associated with signs, the Court ruled that the law "almost completely foreclosed a venerable means of communication that is both unique and important." The Court conveyed a "special respect" for an individual's right to liberty in his/her own home.

Lamb's Chapel v. Center Moriches School District, 508 U.S. 385 (1993)
Did the district violate the First Amendment's freedom of speech and free exercise of religion guarantees when it denied Lamb's Chapel the use of school premises to

show religious-oriented films? By a unanimous vote, the Supreme Court ruled that such a denial was unconstitutional. First, the district violated freedom of speech by refusing the Chapel's request to show movies on school premises solely because of the religious content of the films. Although non-public schools are permitted under New York law to restrict access to their premises based on content or speaker identity, such restrictions must be reasonable and "viewpoint neutral." By refusing access only to a religious perspective, the district violated the standard of reasonableness and neutrality. Second, permitting the Chapel to use the district's premises would not have violated the establishment clause. Public access to school facilities after school hours by religious groups is constitutionally permissible.

Lee v. Weisman, 505 U.S. 577 (1992)
Do prayers offered at official public school ceremonies violate the establishment clause of the First Amendment? In a 5-to-4 decision, the Court held that the government's involvement in religious ceremonies during commencement creates "a state-sponsored and state-directed religious exercise in a public school." The school's policy creates subtle and indirect coercion by forcing students to act in ways that promote religion. The Court cited the age of the audience and the nature of the event as factors that distinguished between prayers at graduation and prayers at other government functions like those the Court had upheld in *Marsh v. Chambers* (1983).

Lemon v. Kurtzman, 403 U.S. 602 (1971)
Did the Rhode Island and Pennsylvania statutes, which provided for the financial support of secular subjects in religious schools, violate the First Amendment's establishment clause? Writing for the majority, Chief Justice Burger articulated a three-part test to be used in establishment clause cases. To be constitutional, a statute or state action must have (1) "a secular legislative purpose," (2) it must have principal effects which neither advance nor inhibit religion, and, (3) it must not foster "an excessive government entanglement with religion." The Court found that the subsidies provided to parochial schools in both states failed this test. In particular, the Court held that both schemes excessively entangled government and religion. Although some justices would prefer to use a different test, the three-part *Lemon* test is still used by the Court in establishment clause cases.

Lochner v. New York, 198 U.S. 45 (1905)
Does the New York law requiring that bakers not work more than sixty hours in a week or ten hours a day violate the liberty protected by due process of the Fourteenth Amendment? The Court invalidated the New York law. The majority maintained that the statute interfered with the freedom of contract, and thus the Fourteenth Amendment's right to liberty afforded to employer and employee. The Court viewed the statute as a labor law; the state had no reasonable ground for interfering with liberty by determining the hours of labor. The Court's decision in this case was overruled in *West Coast Hotel Company v. Parrish* (1937).

Lynch v. Donnelly, 465 U.S. 668 (1984)
Did the inclusion of a nativity scene in the City of Pawtucket, Rhode Island's holiday display violate the establishment clause of the First Amendment? While acknowledging the religious significance of the crèche, the Court ruled the city had not violated the establishment clause. The Court found that the display, viewed in the context of the holiday season, was not a purposeful effort to advocate a particular religious message. Rather, the display merely depicted the historical origins of the holiday and the city had "legitimate secular purposes" for its display. The Court held that such symbols posed no danger of establishing a state church.

Mapp v. Ohio, 367 U.S. 643 (1961)
May evidence obtained through a search in violation of the Fourth Amendment be admitted in a state criminal proceeding? The Court held that "all evidence obtained by searches and seizures in violation of the Constitution is, by [the Fourth Amendment], inadmissible in a state court." Mapp's conviction was overturned because the evidence used to convict her violated the Fourth Amendment. This decision applied the exclusionary rule to the states thereby excluding illeally obtained evidence from courts at all levels. The decision also overruled *Wolf v. Colorado* (1949).

Marbury v. Madison, 5 U.S. 137 (1803)
Is Marbury entitled to his appointment of Justice of the Peace in the District of Columbia? Is a writ of mandamus the correct way to get it? And, is the Supreme Court the place for Marbury to get the relief he requests? The Court held, in an opinion authored by Chief Justice John Marshall, that the Constitution was "the fundamental and paramount law of the nation," that it was the duty of the judiciary to interpret the Constitution, and that "an act of the legislature repugnant to the constitution is void." In other words, when the courts rule that an act of the legislature conflicts with the Constitution—the highest and supreme law, the act is invalid. Although Marbury was entitled to his commission, the Supreme Court could not have original jurisdiction in mandamus cases as provided for by Section 13 of the Judiciary Act of 1789. Article Three, Section Two of the Constitution limits the courts' original jurisdiction to a narrow range of cases. Thus, the Supreme Court ruled that Section 13 of the Judiciary Act

of 1789 was unconstitutional, establishing the Supreme Court's power of judicial review of acts by the executive and legislative branches of the federal government.

Marsh v. Chambers, 463 U.S. 783 (1983)
Does opening the Nebraska legislature with a prayer violate the establishment clause of the First Amendment? In a 6-to-3 decision, the Court upheld this practice. In his opinion for the Court, Chief Justice Warren Burger abandoned the three-part test of *Lemon v. Kurtzman*, which had been used for cases involving the establishment clause. Burger's majority opinion used historical evidence to guide the Court. Prayers by tax-supported legislative chaplains could be traced to the First Continental Congress and to the First Congress that framed the Bill of Rights. Through his analysis, Burger concluded the practice had become "part of the fabric of our society." In such circumstances, an invocation for Divine guidance is not an establishment of religion. "It is," wrote Burger, "simply a tolerable acknowledgment of beliefs widely held among the people of this country."

Maryland v. Wilson, (1997)
May the police order passengers to exit vehicles during traffic stops without violating the Fourth Amendment's search and seizure guarantees? The Court held that after lawfully stopping a speeding vehicle, an officer may order its passengers to step out. The Court reasoned that the government's interest in officer safety outweighs the slight infringements on personal liberty posed by such action. The conviction of Wilson was upheld.

McCollum v. Board of Education, 333 U.S. 203 (1948)
Does the use of the public schools for religious classes violate the First Amendment's establishment clause? The Court held that the use of public property for religious instruction and the use of the machinery of the public school for religious purposes violated the establishment clause. Because pupils were required to attend school and were released in part from this legal duty if they attended the religious classes, the Court found that the school system was "beyond question a utilization of the tax-established and tax-supported public school system to aid religious groups and to spread the faith." Although Champaign's "shared time" system attempted to treat all religions equally, it did so violating the establishment clause.

Meyer v. Nebraska, 262 U.S. 390 (1923)
Does the Nebraska statute, prohibiting the teaching of modern foreign languages to grade school children, violate the Fourteenth Amendment's due process clause? The Nebraska law was ruled unconstitutional. Nebraska violated the liberty protected by the due process clause of the Fourteenth Amendment. State regulation of liberty must be reasonably related to an important state objective. In this case, the state's reasons for interfering with individual liberty were inadequate. The legislative purpose of the law was to promote assimilation and civic development. These purposes, however, were not adequate to justify interfering with Meyer's liberty to teach or the liberty of parents to employ him during a period of peace.

Minersville School District v. Gobitis, 310 U.S. 586 (1940)
Did the school, by forcing students to salute the flag, infringe upon liberties protected by the First and Fourteenth Amendments? In an 8-to-1 decision, the Court upheld the mandatory flag salute. The Court found that the state's interest in "national cohesion" was "inferior to none in the hierarchy of legal values" and that national unity was "the basis of national security." The flag was an important symbol of national unity and could be used "to promote in the minds of children who attend the common schools an attachment to the institutions of their country." This decision was overturned by the Court in *West Virginia State Board of Education v. Barnette* (1943).

Miranda v. Arizona, 384 U.S. 436 (1966)
Does the Fifth Amendment require the police to inform individuals of their right to counsel and their protection against self-incrimination? The Court held that prosecutors could not use statements of defendants unless they demonstrated the use of procedural safeguards "effective to secure the privilege against self-incrimination." The Court concluded that the "modern practice of in-custody interrogation is psychologically rather than physically oriented." The decision specifically outlined the necessary aspects of police warnings to suspects, including warnings of the right to remain silent and the right to have counsel present during interrogations. As a result of this decision, "Miranda warnings" are now a routine procedure before police interrogations.

New Jersey v. TLO, 469 U.S. 325 (1985)
Did the search of the purse violate T.L.O.'s, a student at a public school, Fourth Amendment rights? Balancing the school's interest in providing a healthy learning environment with the student's individual rights, the Court abandoned its requirement of "probable cause" in the school environment. In school settings, the Court announced a less strict standard of "reasonable suspicion." The presence of rolling papers in the purse gave rise to a reasonable suspicion that T.L.O. may have been carrying drugs, thus, justifying a more thorough search of the purse. Using this lowered standard of review, the Court ruled the vice-principal's search of T.L.O.'s purse did not violate the Fourth Amendment.

New York Times Co. v. Sullivan, **376 U.S. 254 (1964)**
To what extent may a state restrict the speech of a person critical of a public official without infringing the First Amendment guarantees of freedom of speech and freedom of press? Was Alabama's libel law, which allowed for convictions without regard to intent, unconstitutional? The Court held that the First Amendment protects the publication of all statements, even false ones, about the conduct of public officials except when statements are made with actual malice (evil intent). In striking down the law, the Court reasoned that the law had a chilling effect on the free exchange of ideas important to our society. Under this new standard, it is difficult for public officials to sue the media for libel.

Palko v. Connecticut, **302 U.S. 319 (1937)**
Does the protection against double jeopardy, guaranteed by the Fifth Amendment, apply to the states by virtue of the Fourteenth Amendment's due process clause? The Supreme Court upheld Palko's second conviction. Writing for the majority, Justice Cardozo formulated principles that continue to direct the Court's actions. He noted that some of the Bill of Rights guarantees—such as freedom of thought and speech—are fundamental, and that the liberty contained in the Fourteenth Amendment's due process clause incorporated these fundamental rights and applied them to the states. Protection against double jeopardy was not a fundamental right and deserving of substantive protection. However, in 1969, *Benton v. Maryland,* the Court ruled that the Fifth Amendment's ban of double jeopardy was a provision of the Bill of Rights to be selectively incorporated by the Fourteenth Amendment and applied to the states.

Plyler v. Doe, **457 U.S. 202 (1982)**
Did the Texas law, allowing the state to withhold state funds for educating the children of illegal aliens, violate the equal protection clause of the Fourteenth Amendment? The Court held that illegal aliens and their children are people "in any ordinary sense of the term" and, therefore, are deserving of equal protection under the law. Since the equal protection clause protects people, regardless of citizenship, it applies to illegal aliens. By denying illegal aliens an education, in the absence of a compelling state interest, Texas was found to be violating the equal protection clause.

Powell v. Alabama, **287 U.S. 45 (1932)**
Did the hurried trials of nine black youth accused of raping two white women violate the due process clause of the Fourteenth Amendment? The Court held that the trials denied due process because the defendants were not given reasonable time to prepare their defense or to secure counsel. Thus, the convictions were overturned. This case established a guarantee that poor defendants must be provided counsel in capital cases at the state level and was an early example of national constitutional protection in the field of criminal justice.

Reno v. ACLU, **(1997)**
Were certain provisions of the 1996 Communications Decency Act overly broad and vague and thus violations of the First and Fifth Amendments to the Constitution? The Court held that the Act violated the First Amendment because its regulations amounted to a content-based restriction on free speech and placed too "heavy a burden on protected speech." The Act failed to clearly define "indecent" communications or justify its sweeping restrictions. The Court also ruled that the Act failed to demonstrate that "offensive" material is without any social value and that the First Amendment distinguishes between "indecent" and "obscene" sexual expressions, protecting only the former. The Fifth Amendment issues were not addressed by the Court.

Rosenberger v. Rector and Visitors of the University of Virginia, **515 U.S. 819 (1995)**
Did the University of Virginia violate the First Amendment rights of its Christian magazine staff by denying them the same funding resources that it made available to secular student-run magazines? A divided Court held that the University's denial of funding, due to the content of speech, amounted to viewpoint discrimination. The Court reasoned that no matter how scarce University publication funding may be, if it chooses to promote any speech, it must promote all forms equally. The Court rejected potential establishment clause concerns because the University's program had been neutral with respect to religion. Providing funding to a religious publication, on the same bases it does other publications, does not violate the establishment clause. The Court concluded by stating that the University could not stop all funding of religious speech while continuing to fund an atheistic publication. The free speech guarantee of the First Amendment barred the University from withholding funding from the religious magazine.

Schenck v. United States, **249 U.S. 47 (1919)**
Are Schenck's circulars, advising against American involvement in World War I and urging draftees to petition the repeal of the Conscription Act, protected by the free speech clause of the First Amendment? Justice Holmes, writing for a unanimous Court, concluded that Schenck's speech is not protected in this situation. The character of every act depends on the circumstances. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." In the context

of America's involvement in World War I, the First Amendment did not protect Schenck from prosecution under the Espionage Act of 1917.

Slaughterhouse Cases, **83 U.S. 36 (1873)**
Did the creation of the monopoly in the beef packing industry violate the Thirteenth and Fourteenth Amendments? The Court upheld the Louisiana law in a 5-4 decision. The Court ruled that the Thirteenth Amendment did not forbid the state to limit property use. The equal protection claim was misplaced since it was intended to protect newly freed slaves. The due process clause of the Fourteenth Amendment, the Court ruled, simply imposes the identical requirements on the states as the Fifth Amendment imposes on the national government. The Court narrowly constructed the privileges and immunities clause, which was interpreted to apply the privileges and immunities of national citizenship, not state citizenship. Thus, the Court's early interpretation of the Fourteenth Amendment provided little protection for individual rights. Although the privileges and immunities clause continues to be defined narrowly by the Court, 20th century interpretations of both the equal protection and due process clauses have greatly expanded the protection of individual rights.

Terry v. Ohio, **392 U.S. 1 (1968)**
Was the search and seizure of Terry and the other men, whom the officer believed to be "casing a job," in violation of the Fourth Amendment? In an 8-to-1 decision, the Court held that the search was reasonable under the Fourth Amendment and that the weapons seized could be introduced into evidence against Terry. Focusing on the facts of this case, the Court found that the officer acted on more than a "hunch" and that "a reasonably prudent man would have been warranted in believing [Terry] was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior." The Court found that the searches in this case were limited in scope and designed to protect the officer's safety.

Texas v. Johnson, **491 U.S. 397 (1989)**
Is the desecration of an American flag a form of speech that is protected under the First Amendment? In a 5-to-4 decision, the Court held that Johnson's burning of an American flag was protected expression under the First Amendment. The Court found that Johnson's actions fell into the highly protected category of political expression. The government may not justify prohibitions on speech solely because the speech is deemed "offensive." The Court also held that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." A large number of Americans now support a constitutional amendment to protect the American flag from desecration.

Tinker v. Des Moines, **393 U.S. 503 (1969)**
Does a public school, that prohibits the wearing of armbands as a form of symbolic speech, violate the First Amendment's freedom of speech protections? The Court ruled the wearing of armbands was "closely akin to 'pure speech'" and protected by the First Amendment. Although the school environment implies possible limitations on freedom of expression that would not be warranted in other public places, in this case the principals had failed to show that the wearing of armbands would substantially interfere with an appropriate school environment. In the absence of adequate justifications, the school's policy was ruled unconstitutional.

Twining v. New Jersey, **211 U.S. 78 (1908)**
Does comment upon a defendant's failure to testify by the prosecution violate the "liberty" protected by the Fourteenth Amendment's due process clause? Neither the privileges and immunities clause nor the due process clause incorporates the right against self-incrimination found in the Fifth Amendment. Justice Moody, writing for the Court, held that the right against self-incrimination was not fundamental and therefore not deserving of substantive protection. However, the Court did say, in principle, the due process clause of the Fourteenth Amendment could incorporate some fundamental rights of the Bill of Rights if they were judged essential to justice and liberty. This standard would become a guideline to future interpretations of the Fourteenth Amendment and to the incorporation of the Bill of Rights.

United States v. Carolene Products Co., **304 U.S. 144 (1938)**
Does the "Filled Milk Act," banning the interstate shipment of milk filled with vegetable oil, violate the commerce power granted to Congress in Article One, Section Eight and the due process clause of the Fifth Amendment? The Court upheld the Act. In this otherwise unremarkable case, the Court planted the seeds for a new jurisprudence in footnote four to Justice Stone's opinion for the Court. In footnote four, Stone gives a presumption of constitutionality to economic regulation. The Court would no longer employ strict scrutiny to economic regulation. Stone went on to assert in footnote four that certain types of legislation might receive more exacting judicial scrutiny. Cases that involved the Bill of Rights, the protection of discrete and insular minorities, and ones that involved the political process would call for a "more searching judicial inquiry."

Vernonia School District v. Acton, 515 U.S. 646 (1995)
Does random drug testing of high school athletes violate the search and seizure clause of the Fourth Amendment? In this case, the Court said "no." The reasonableness of a search is judged by "balancing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests." High school athletes who are under state supervision during school hours are subject to greater control than other free adults. The Court held that the privacy interests compromised by urine samples are negligible since the conditions of collection are similar to public restrooms, and the results are viewed only by limited authorities. Furthermore, the school's concern over the safety of minors under their supervision overrides the minimal, if any, intrusion into the privacy of student-athletes.

Wallace v. Jaffree, 472 U.S. 38 (1985)
Did the Alabama law, authorizing teachers to conduct regular religious services during the school day in classrooms, violate the First Amendment's establishment clause? The Court determined the constitutionality of Alabama's prayer and meditation statute by focusing on the first prong of the three-part *Lemon* test, which asked if the statute's purpose was to endorse or disapprove of religion. The Court held that Alabama's prayer and meditation statute was not only a deviation from the state's duty to maintain absolute neutrality toward religion, but was an endorsement of religion. Since the statute clearly lacked any secular purpose as it sought to establish religion in public schools, it violated the First Amendment's establishment clause.

Weeks v. United States, 192 U.S. 585 (1914)
Did the warrantless search of Weeks' home and seizure of papers violate the Fourth Amendment? In a unanimous decision, the Court held that the seizure of items from Weeks' residence directly violated the Fourth Amendment. In addition, the Court held that the government's refusal to return Weeks' possessions also violated the Fourth Amendment. This case established the exclusionary rule at the federal level. The exclusionary rule was not a requirement at the state level until the Court's decision in *Mapp v. Ohio* (1961).

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)
Did the compulsory flag-salute for public school children violate the First Amendment? In a 6-to-3 decision, the Court overruled its decision in *Minersville School District v. Gobitis* (1940) and held that compelling public school children to salute the flag was inconsistent with the First Amendment. The Court found that saluting the flag was a form of expression and was a means of communicating ideas. Compelling children to salute the flag was antithetical to the principles of the First Amendment. Writing for the majority, Justice Jackson argued that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Westside Community Schools and Mergens, 496 U.S. 206 (1990)
Did the Equal Access Act apply to Westside? And, was the Equal Access Act at odds with the establishment clause of the First Amendment? The Court ruled that Westside maintained a "limited open forum" and that the Equal Access Act applied to the school. Since Westside permitted other noncurricular clubs, it was prohibited under the Equal Access Act from denying equal access to any after-school club based on the content of its speech. In this case, Westside was prohibited from denying access to its facilities by a student religious club. Westside argued that the establishment clause prevented the use of its facilities by a student religious club. The Court rejected this argument and ruled that the Equal Access Act was constitutional because it served an overriding secular purpose, it neither advanced nor hindered religion, and it did not excessively entangle government with religion. As such, the Act protected the Christian club's formation and use of school facilities, even if its members engaged in religious discussions on school property.

Widmar v. Vincent, 454 U.S. 263 (1981)
Did the University of Missouri at Kansas City, by denying access to its facilities by a student religious group, violate the students' constitutionally protected rights to free exercise of religion and free expression? The Court held that the university, by granting access to a range of other student groups, had created a limited open forum and had to justify its content-specific limitations on student speech with a compelling state interest. Although the school's interest in not violating the establishment clause was compelling, the Court ruled that a policy of equal access to its facilities would not violate the establishment clause. Thus, the school's policy violated the students constitutional rights to free expression.

Wolf v. Colorado, 338 U.S. 25 (1949)
Were the states required to exclude illegally seized evidence from trial under the Fourth and Fourteenth Amendments? In a 6-to-3 decision, the Court held that the Fourteenth Amendment did not subject criminal justice in the states to specific limitations and that illegally obtained evidence did not have to be excluded from trials in all cases. The Court reasoned that while the exclusion of evidence may

have been an effective way to deter unreasonable searches, other methods could be equally effective and would not fall below the minimal standards assured by the due process clause. Other remedies, such as "the internal discipline of the police, under the eyes of an alert public opinion," were sufficient. This was the first time that Fourth Amendment rights were incorporated by the Fourteenth Amendment and applied to the states. In 1961 *Mapp v. Ohio*, the Court departed from the *Wolf* decision to apply the exclusionary rule to the states.

Zorach v. Clausen, 343 U.S. 306 (1952)

Did the New York program in which students in public schools could be dismissed from classroom activities for certain periods to participate in religious instruction elsewhere violate the establishment clause of the First Amendment? In a 6-to-3 decision, the Court held that the "released time" program neither constituted the establishment of religion nor interfered with the free exercise of religion. The Court concluded that public facilities were not being used for the purpose of religious instruction and that "no student was forced to go to the religious classroom." Writing for the majority, Justice Douglas argued that there was "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

CHAPTER SIX
Annotated Bibliography of ERIC Resources

The materials included in the following annotated bibliography can be obtained through ERIC (Educational Resources Information Center). ERIC is a nationwide educational information system operated by the Office of Educational Research and Improvement of the U.S. Department of Education. Items in the ERIC database are assigned either ED or EJ numbers that are provided at the end of each citation. ERIC documents are abstracted monthly in *ERIC's Resources in Education (RIE)* index. *RIE* indexes are available in more than 850 libraries throughout the country. Many of these libraries have a complete collection of ERIC documents on microfiche for viewing and photocopying.

Microfiche reproductions of ERIC documents, which include ED numbers, may be purchased from the ERIC Document Reproduction Service (EDRS), 7420 Fullerton Road, Suite 110, Springfield, VA 22153-2852. Some documents may be available in paper copy. The telephone numbers are (703) 404-1400 or (800) 443-3742. The fax number is (703) 440-1408. When ordering by mail, be sure to include the ED number, specify either microfiche or paper copy, if available, and enclose your payment.

All of the journal article annotations, which include EJ numbers, appear in the *Current Index to Journals in Education (CIJE)*, which is published on a monthly basis and is available at larger libraries throughout the country. Entries in this bibliography provide only a brief description of the articles. If your library does not carry the journal in question, reprints are available from University Microfilms International (UMI), 300 North Zeeb Road, Ann Arbor, MI 48106, (800) 732-0616.

The ERIC documents and general articles chosen for this bibliography are only a small representative sample of those to be found in the ERIC database. This sample provides a glimpse of the rich variety of sources available. Among the following selection you will find sources prepared for a variety of learners and teaching styles. They include sources for gifted and talented students, teaching English as a second language, middle and high school classes, adult education programs, teaching through historical documents and cases, using the Internet, and conducting mock trials. These entries supplement the teaching of specific issues raised in the scripted trials of this volume, but are useful for anyone teaching about the history or principles of the Unites States Constitution.

This highly selective list generally focuses on resources published within the last five years. However, there are a plethora of rich materials available on this topic—much of it published in the years surrounding the bicentennials of the United States' independence and the writing of the U.S. Constitution (1976 and 1987 respectively). Readers are encouraged to explore the ERIC database to find both older, and more recent entries. The citations for all material in the following annotated bibliography are listed in alphabetical order by author's name.

American Bar Association Special Committee on Youth Education for Citizenship. "First Amendment." *Update on the Courts* 3 (Spring 1995):1-13. ED394872.

Two articles in this instructional newsletter elucidate rulings by the United States Supreme Court, Circuit Court of Appeals, and District Courts affecting state sponsored school prayer: (1) "First Amendment Prayer Pendulum"; (2) "First Amendment. *Rosenberger v University of Virginia.*" The newsletter provides the facts of the cases, legal precedents, arguments presented by both sides, significance of the decisions, as well as suggestions for appropriate teaching methods. Articles cover the First Amendment issues of school prayer and public funding for student religious magazines through student activities fees. Teaching strategies for examining both of these issues, including student handouts, are provided.

American Bar Association Special Committee on Youth Education for Citizenship. *Law Day Stories: An Anthology of Stories about Lawyers, Lawmakers, and the Law,* 1995. ED393712.

Dedicated to celebrating the importance of law in U.S. life, the nineteen stories collected in this volume are about legislators who enact the law, judges who interpret it, and lawyers who practice it. The stories describe the contributions to the United States through the law of distinguished individuals, emphasizing the devotion of many lawyers to public service. The stories also explain landmark court cases that helped build, extend, and solidify the U.S. tradition of legal rights and responsibilities. The stories examine a wide variety of subjects, including Pauli Murray's efforts to safeguard the civil rights of her fellow African Americans; Clarence Gideon's and Abe Fortas' struggle for the right to a free attorney for poor persons accused of a felony; the delayed acknowledgment of the constitutional rights of interned Japanese-Americans; Thomas Jefferson's brilliance as a young lawyer; the judicial and legislative efforts of Native Americans on behalf of their free exercise of religion; Thurgood Marshall's role in the cessation of school segregation in *Brown v. Board of Education;* the Supreme Court's elaboration of the "exclusionary rule" as a measure to safeguard to Fourth Amendment's protection of citizens from unreasonable searches and seizures; and Ruth Bader Ginsburg's fight against sexual discrimination and her elevation to the Supreme Court.

American Bar Association Special Committee on Youth Education for Citizenship. *Liberty: Constitutional Update.* Bar/School Partnership Programs Series, 1988. ED344794.

This is the first of four special handbooks on constitutional themes. "The Idea of Liberty" (I.Starr) suggests that for teaching purposes, the First Amendment in the Bill of Rights is an excellent operating definition of liberty. "Introducing the First Amendment" (D. Sorenson) is a lesson plan for use with upper elementary and middle school students. "The Bill of Rights" (C. Yeaton; K. Braechel) is a lesson plan designed to introduce that document to students in grades 4-6. "Freedom of Speech" and "Freedom of Speech and Expression" (D. Greenawald) are lesson plans for grades 4-6 and 7-12 respectively, designed to teach students why freedom of speech is important in a democracy. "Come to the First Amendment Fair" (A. Blum) is a lesson plan for secondary students that focuses on the standards that may limit government in the free speech area. "Going beyond Darwin" (M. Croddy) examines legislation and court cases that have influenced what is taught in schools concerning evolution. "The Religious Guarantees" (National Archives), a lesson plan for use with secondary students, examines the two guarantees of the First Amendment that relate to religion. "Our Freedom to Assemble and Associate" (A. Blum), for use in grades 9-12, looks at these freedoms. "It's My Life" (J. D. Bloom), for use in secondary grades, focuses on governmental power. "Historical Foundations of Individual Liberties" (S. Jenkins), for grades 9-12, helps students understand how the historical antecedents of the Bill of Rights affect their daily lives.

American Jewish Congress. *Religion in the Public Schools: A Joint Statement of Current Law,* 1995. ED387390.

Organizations that span the ideological, religious, and political spectrum stand together as they make this a statement of consensus on current law regarding religion in public schools. Each organization professes a commitment to the freedom of religious practice and the separation of church and state that such freedom requires. The statement is devised to aid parents, educators, and students. It offers a summary of current law on school prayer, including: official participation or encouragement of religious activities; teaching about religion; student assignments and religion; the distribution of religious literature; before and after school activities; religious persuasion versus harassment; the Equal Access Act; religious holidays; excusal from religiously-objectional lessons; teaching of values; student garb; and release time. Following the text is an appendix listing contact addresses for organizations associated with this statement.

Appleton, Sheldon. "Teaching about American Democracy through Historical Cases." *PS: Political Science and Politics* 28 (December 1995): 730-33. EJ534995.

Outlines several historical cases that can be used to illustrate and teach paradoxical concepts concerning democracy. For example, can an "undemocratic" action be correct (the Louisiana Purchase)? The combination of historical incident and controversy provokes a lively and challenging discussion of democratic principles.

Aronson, David. "Class Action: Students Learn Rights and Responsibilities through Law-Related Education." *Teaching Tolerance* 5 (Spring 1996): 43-47. EJ533597.

Proponents of law-related education in high school assert that an understanding of legal principles is essential for the maintenance of a tolerant pluralistic society. The law-related education curriculum uses mock trials and case studies to teach the principles of the judicial system.

Bakker, Don. *A More Perfect Union: Shaping American Government [and] Teacher Resource Packet.* Choices for the 21st Century Project, 1996. ED409243.

The student and teacher resource books contain primary sources that focus on the values, beliefs, and interests that influenced the political development of the United States as a nation. Students revisit the events and controversies of 1763-88 through primary source documents and reconstructed debates to gain a deeper understanding of the political climate of the era and the values that contributed to the nation's political foundation. In exploring the parallels between the debates of 1776 and 1788 and the country's current political discourse, students gain an insight into the issues that define the current age. A "Chronology of America's Foundation: 1754-1791" and suggested readings are included in the student book. The teacher resource book contains 10 lesson plans that stress interactive, group-oriented learning and student-centered instruction. The teacher book contains student readings; a framework for policy options; the lesson plans; and resources for structuring cooperative learning, role-plays, and simulations.

Brady, Sheila, and others. *It's Yours: The Bill of Rights. Lessons in the Bill of Rights for Students of English as a Second Language,* 1991. ED346000.

This curriculum presents lessons and materials designed to teach immigrant students their rights and responsibilities under the U.S. legal system. The lessons employ interactive strategies, and develop higher order thinking skills as they foster English language learning. The curriculum contains eight units: (1) "Roots of Rights: Introduction to the Bill of Rights"; (2) "Free

Speech, Assembly, Press: Freedom of Speech; Freedom of Press; Freedom of Assembly; Freedom to Petition Government"; (3) "Freedom to Believe: Freedom of Religion"; (4) "It's about Privacy: Freedom from Unreasonable Search and Seizure"; (5) "Rights of the Accused: Right to a Lawyer; Right to Trial by Jury; Protection Against Cruel and Unusual Punishment"; (6) "Equal Protection Under the Laws: Equal Rights"; (7) "The Bill of Rights and Your Body: Right to Privacy"; and (8) "The Right to Vote: Right to Vote and Participate." The Universal Declaration of Human Rights and the Extended Bill of Rights are appended.

Constitutional Rights Foundation. *The Drug Question: The Constitution and Public Policy.* Teacher Guide. Chicago, Illinois, 1990. ED393783.

This teacher guide complements the student text presentation of lesson plans on the subject of illegal drug use. The booklet begins with an explanation of the benefits of law-related education (LRE) for democratic education. The guide then outlines suggestions for handling controversy; directing discussion; organizing cooperative and small group learning; infusing simulations and role-playing into the curriculum; and utilizing resource experts in the classroom. Each unit includes specific purposes, objectives, time requirements, resources, and procedures for each of the six lesson plans. Each lesson plan includes readings, discussion questions, and other activities teachers can use to help students understand the problems and legal issues surrounding drug abuse and the government's role in seeking solutions. Units include (1) "Problems and Proposals"; (2) "Views You Can Use: Assessing Public Opinion"; (3) "The Fourth Amendment and the Exclusionary Rule"; (4) "Drugs and the Courts: Applying the Exclusionary Rule"; (5) "The State Legislative Process: Formalizing Policy through Law"; and (6) "Making Public Policy Work: The Community and the Individual."

Delon, Floyd G. "Pupil Rights in the 'New' South Africa: Comparisons and Contrasts with American Constitutional Law." *West's Education Law Quarterly* 5 (January 1996): 140-48. EJ522703.

Examines provisions of the South African Constitution pertaining to pupil rights in conjunction with the construction the United States Supreme Court has placed on corresponding provisions of the U.S. Constitution.

Gaffney, Patrick V., and Francis M. Gaffney. *Analysis of and Educators' Attitudes Toward the Right of Public School Students Regarding Mandatory Participation in Patriotic School Exercises,* 1996. ED398217.

This paper reviews various court decisions, especially *West Virginia State Board of Education v. Barnette,* regarding the right of public school students to refuse to participate in mandatory patriotic school exercises and discusses the attitudes of teachers regarding mandatory participation. In *Barnette,* the Supreme Court, by a six-to-three majority, ruled that it was unconstitutional for public school officials to require students to salute and pledge allegiance to the flag at the risk of expulsion from school. Three conclusions drawn from literature on attitudes are: educators' attitudes about the legal rights of public students have been found, in some instances, to be positively related to the treatment of students in a manner that complies with existing legal precedent; teachers should serve as role models for students during their formative years by setting an example for interpreting the meaning of civil liberties; and an important part of fulfilling teachers' leadership function lies in establishing and maintaining attitudes supportive of students' legal rights. A sample of fifty-seven preservice and thirty-three inservice teachers in an undergraduate foundations of education course reported their opinions of a statement that public school students should be required to participate in the Pledge of Allegiance and flag salute ceremony. A total of fifty-four percent of preservice teachers and thirty-nine percent of inservice teachers agreed with the statement; seventy-seven percent of all subjects perceived their knowledge of this area of the law to be low; and the majority had received no training. Recommendations are made for further studies in areas regarding students' legal rights.

Gallo, Maria. *Controversial Issues in Practice. Classroom Focus. Social Education* 60 (January 1995): 1-4. EJ525313.

Presents three law-related education lesson plans discussing the relationship between church and state. The first two lessons, establishment of religion and free exercise of religion, culminate in the third, a round table discussion. The students research, role play, and argue hypothetical and real court cases.

Gold, Julia Ann, and others. *Challenging Students with the Law. An Interdisciplinary Curriculum for Gifted and Talented Students at the Upper Elementary and Middle School Levels,* 1993. ED388536.

This curriculum guide, suitable for a wide range of students from elementary to high school, offers an interdisciplinary approach to law-related education (LRE) intended to assist teachers with introducing LRE into courses for gifted and talented students and all types of learners. Each lesson identifies how many of the seven intelligences (Howard Gardner, 1993) are utilized in that lesson. The eight units of the curriculum cover the legal issues of the old growth forests, the internment of Japanese Americans, the Salmon Summit, the automobile industry, freedom of speech, search and seizure in Wash-

ington state, immigration, and animal rights. The guide begins with a definition of LRE, its objectives and methods, and its place in the general school curriculum. The introductory section also includes a description of the University of Puget Sound School of Law's Institute for Citizen Education in the Law (UPSICEL) and a history of this curriculum project. The lessons encourage interactive and cooperative learning through the methods of brainstorming, hypotheticals and case studies, role playing and simulation, group activities, and opinion polls. Each lesson plan specifies the required number of class periods, the objectives, and procedures. The lesson plans include student handouts such as newspaper articles and worksheets.

Gottlieb, Stephen S. *Teaching about the Constitutional Rights of Students.* ERIC Digest, 1992. ED348320.

This ERIC digest presents a rationale for teaching students about their rights and responsibilities as citizens under the U.S. Constitution. Social studies teachers have a special role in shaping the lives of young citizens and influencing whether students become politically involved adults. Specific constitutional rights such as the right of a criminal suspect to legal representation and the bar on the imposition of cruel and unusual punishment are raised as important subjects for students to understand. Methods of teaching about these rights are suggested. Student rights and responsibilities under the U.S. Constitution also are discussed.

Hall, Kermit L. *The Power of Comparison in Teaching about Constitutionalism, Law, and Democracy,* 1993. ED369727.

Promoting change in civic education means rethinking what are the important aspects to teach about the Constitution, law, and democracy to equip students to be effective and affective citizens. The scope of instruction needs to broaden to include specific comparisons between the U.S. federal system of law and constitutionalism with counterparts in other nations. The comparative approach offers three functions: (1) creates an awareness of alternatives; (2) allows students to test the relative impact of various social, economic, demographic, political, or intellectual factors on the form of different nation's civic cultures; and (3) permits students to identify common patterns of action and behavior. A discussion of various constitutions and laws provides examples to learn about the advantages and limitations of the U.S. Constitution, law, and policy. The examples show the unique aspects of the U.S. Constitution and law, gives meaning to concepts of globalization, internationalization, and multiculturalism, and provides opportunities to appreciate others. Two proposals promote a modest and a radical view on instruction: (1) the modest proposal combines the multicultural emphasis to a broadened vision of cross-cultural and international studies of law and law-related subjects; and (2) the radical proposal adopts a strongly thematic and value-based approach that would look less at understanding the system and more on appreciating the values embodied in that system.

Hamline University School of Law. *Mini-Mock Trial Manual,* 1993. ED374065.

Designed to help students learn about courts and trials in an interesting and enjoyable way, this document provides teachers with the necessary instructions and materials on how to conduct mock trials. By using the program, students become familiar with the role of a trial court in resolving disputes. They also are introduced to court procedure and decorum, and develop an appreciation for the importance of the various people in the courtroom. Involvement in a mock trial allows students to practice communication and critical thinking skills as they prepare and present their case. In addition to teacher instructions, the manual includes student handouts for five mini-mock trials. The handouts consist of a juror biography, jury observation sheet and checklist, case facts, prosecution and defense witness statements, and jury instructions.

Kopecky, Frank. "School Safety and Congress—Teaching Strategy." *Update on Law-Related Education* 19 (Fall 1995): 37-40. EJ520846.

Presents a lesson plan that examines the effects of Supreme Court decisions on state/federal relations using the issue of school safety. Student handouts discuss the constitutionality of the Gun Free School Zones Act as it relates to a specific criminal case. Activities include several structured discussions.

Leming, Robert S. *Teaching about the Fourth Amendment's Protection against Unreasonable Searches and Seizures.* ERIC Digest, 1993. ED363526.

This digest discusses issues related to teaching about the Fourth Amendment of the U.S. Constitution. It begins by quoting the amendment that protects citizens of the United States against unreasonable searches and seizures, and goes on to discuss how the understanding and interpretation of the amendment have been influenced by historical events, technological inventions, and changes in thinking. The first section, on understanding and interpreting searches and seizures, outlines the development of the Supreme Court's interpretation through cases decided from 1886 through *Katz v. United States,* decided in 1967. The telephone, microphone, and instantaneous photography are examples of technological advances that changed the interpretation of the law. The second section explores

the meaning of "unreasonable" in the Fourth Amendment. The discussion explains that it was in two cases, *Weeks v. United States*, decided in 1914, and *Mapp v. Ohio*, 1961, that the Court argued that evidence gathered in an illegal manner, without probable cause or without a search warrant, should be excluded from court proceedings. Various methods are suggested for teaching the Fourth Amendment. They include the case study method; a moot court in which students participate as petitioners, respondents, and justices; a simluated congressional hearing; and scripted trials. The paper lists the following steps for teaching the case study method: (1) review the facts in the case; (2) determine the main constitutional issue in the case; (3) examine alternative arguments on each side of the issue in the case; (4) consider the decision (both the majority opinion and any dissenting opinions), and the legal reasoning in the case; and, (5) assess the implications and significance of the case in constitutional history.

Leming, Robert S. *Teaching the Law Using United States Supreme Court Cases.* ERIC Digest, 1991. ED339673.

Since 1789, the Supreme Court has been making decisions that affect all U.S. citizens. The study of Supreme Court cases, therefore, should be an integral part of civic education. This ERIC Digest discusses (1) constitutional issues and Supreme Court cases that should be taught; and (2) effective strategies for teaching them. It also includes a list of national organizations that develop resources to enhance the teaching of Supreme Court cases.

Lindquist, Tarry L., and others. *Teaching the Bill of Rights. A Guide for Upper Elementary and Middle School Teachers.* University of Puget Sound, Tacoma, WA. Inst. for Citizen Education in the Law, 1991. ED388537.

To celebrate the Bicentennial of the United States Constitution, this curriculum illustrates the concepts of the Constitution and Bill of Rights through events and issues of the Pacific Northwest. The eight units of the curriculum include constitutional visions, the trial of Hershel C. Lyon: an environmental dilemma, comparison of rights around the Pacific Rim, a whole language approach to law and literature, a bibliography, Japanese internment cases, a history of the Bill of Rights, freedom of speech, and self-incrimination. The unit on rights around the Pacific Rim requires students to compare individual rights across cultures and provides information on rights in the United States, Soviet Union, the Philippines, Mexico, Canada and China. For each unit, the curriculum guide explains the sources of the material, the need for resource persons, the number of class periods, a general description, and outcomes. The units include lesson plans which state the objectives, trace the procedures, and present student handouts. The lesson plans endeavor to stimulate student interest through interactive activities such as brainstorming, role plays, mock trials, small groups, and games.

McWhirter, Darien A., Ed. *Search, Seizure, and Privacy. Exploring the Constitution Series,* 1994. ED390730.

This book, part of the "Exploring the Constitution Series," provides a basic introduction to important areas of constitutional law. Each volume contains a general introduction to a particular constitutional issue combined with excerpts from significant Supreme Court decisions in that area. The text of the Constitution, a chronological listing of the Supreme Court justices, and a glossary of legal terms are included in each volume. The controversial topic of search and seizure is explored in this volume. The rights of citizens to be free from invasions of privacy and the needs of law enforcement to apprehend and prosecute criminals are explored in light of Supreme Court and lower court decisions in these areas. The eight chapters in this volume are (1) "Introduction"; (2) "Protecting Property and Privacy"; (3) "Searching Homes and Businesses"; (4) "Searching and Seizing People in Public Places"; (5) "Searching and Seizing Automobiles and Baggage"; (6) "The Exclusionary Rule"; (7) "Privacy beyond Search and Seizure"; and (8) "The Fourth Amendment Today."

Miller, Douglas E. "Government: A Course in Civic Literacy—Easy or Overwhelming?" *Social Studies Review* 35 (Spring-Summer 1996): 22-27. EJ536800.

Describes a high school civics course constructed almost solely around a close reading of the Declaration of Independence, United States Constitution, and Gettysburg Address. Maintains that understanding these documents establishes the minimum essentials of civic literacy and frees classes from the burden of irrelevant and unreadable textbooks.

Monk, Linda R., and others. *The First Amendment: America's Blueprint for Tolerance. Student Edition [and] Teacher Resource.* Close Up Foundation, Arlington, Virginia, 1995. ED395873.

Designed to supplement students' study of the Bill of Rights and the First Amendment, this text can help them identify the First Amendment as a blueprint for a tolerant society. The introduction explains the purpose of the book and describes its contents. The first chapter discusses events leading to the First Amendment's creation. The chapter also demonstrates how tolerance is the Amendment's primary theme. The second, third, and fourth chapters address how specific Supreme Court cases related to freedom of religion, freedom of speech, and freedom of the press support the nation's goal of a tolerant society. The last chapter illustrates how citizens play a vital role in fostering tolerance by ensuring con-

stitutional values within their own communities. After reading the book and discussing specific issues, students should understand that by working together, people can build a more tolerant society. The teacher resource provides a variety of instructional activities to help teachers make use of the accompanying student text. The activities and text can be integrated into and enhance courses such as U.S. history, government, civics, and law. Each unit includes student objectives, a list of terms and concepts, and classroom activities, some of which use case studies that focus on tolerance and the First Amendment. Student handouts accompany many of the activities.

Moore, Wayne D. "Taking a Stand for Speech." *OAH Magazine of History* 9 (Winter 1995): 19-25. EJ09193.

Asserts that freedom of speech issues were among the first major confrontations in U.S. constitutional law. Maintains that lessons from the controversies surrounding the Sedition Act of 1798 have continuing practical relevance. Describes and discusses the significance of freedom of speech to the U.S. political system.

Parachini, Allan, and others. *Prayer in School: An International Survey*, 1995. ED393711.

Placing the debate in the United States over amending the Constitution to permit state-sanctioned school prayer in global perspective, this report analyzes the results of a survey of the school prayer policies of seventy-two countries. The report concludes that the vast majority of the major countries of the world, including Western Europe, Central America, and Asia, have rejected state-sanctioned prayer in their public school systems. Specifically, 70 countries have unified national policies concerning prayer, religious observance, and religious instruction in public schools. Of the 70, 11 countries (15.7%) have state-sanctioned school prayer periods in their schools in which children recite a single prayer together. Eight of the 11 are nations whose religious demographics are for more homogeneous than the United States. Several nations pointedly reject a national policy for such a system including Italy, Israel, and Iran. The report also summarizes the history of the separation of church and state in the United States. It argues that the Founders recognized that for religion to flourish here as they intended, the state would have to stay out of it. Imposing a constitutional amendment designating state-sanctioned prayer periods in the public schools, the report states, would in effect repeal the First Amendment, denigrate and eviscerate its history, and transform the public schools into arenas of religious rivalry. Detailed country-by-country results of this survey are presented in the attached addendum.

Patrick, John J. *Constitutionalism in Education for Democracy: The Continuing Relevance of Arguments on Constitutional Government of the American Founding Era*, 1993. ED359118.

This paper contends that the issues of constitutional government debated during the founding of the United States should be in the core curriculum of any school that seeks to educate students to become responsible citizens of a constitutional democracy. For purposes of teaching students, the issues debated by founding era political thinkers can be formulated around three central, interconnected paradoxes (1) how to achieve liberty with order, (2) how to have majority rule with minority rights, and (3) how to secure the public good and the private rights of individuals. Those documents that exemplify the founding-era consensus and controversy about constitutionalism are identified. These documents include The Declaration of Independence, the Pennsylvania Constitution of 1776, the Massachusetts Constitution of 1780, and many of the papers from the debate between the Federalists and the Anti-Federalists. All of these documents are suggested for student study and research. Finally, three imperatives of teaching and learning about American Constitutionalism are identified and discussed. These imperatives are: (1) systematic teaching of the ideas and issues of the founding-era dialogue and debate on constitutionalism; (2) intellectually active learning by inquiring students; and, (3) ongoing inquiry about ideas and issues in an open classroom climate. Contains 48 references.

Patrick, John J. *Teaching about Democratic Constitutionalism.* ERIC Digest, 1997. ED410177.

There are more than 100 democracies in the world today. All but three of them—Great Britain, Israel, and New Zealand—have written constitutions. This digest examines the importance of constitutions and constitutionalism and the teaching of these concepts through the use of comparisons. The primary objectives of civic education for democratic citizenship are to acquire knowledge of constitutionalism; to use this knowledge to think and act effectively about issues of governance; and to become committed to the maintenance and improvement of constitutionalism within one's polity. In order to compare written constitutions and constitutionalism in different countries, common attributes are reviewed. Six possible attributes are (1) the structure of government; (2) the distribution of powers among executive, legislative, and judicial branches; (3) the limitations on powers of the branches of government; (4) the guarantees of human rights; (5) the procedures for electing, appointing, and replacing government officials; and (6) the methods of constitutional amendment or change.

Patrick, John J. "Teaching the Bill of Rights in Secondary Schools: Four Keys to an Improved Civic Education." *Social Studies* 82 (November-December 1991): 227-31. EJ447868.

Identifies and discusses four keys to improved constitutional rights instruction (1) systematic emphasis on core ideas and issues; (2) analysis and appraisal of core ideas and issues in primary documents; (3) analysis and appraisal of core ideas and issues in judicial cases; and (4) active learning by inquiring students with the help of supportive teachers.

Patrick, John J., and Robert S. Leming. *How to Teach the Bill of Rights*, 1991. ED332928.

Directed to secondary school teachers of history, government, and civics, this book is designed to fit common educational objectives in secondary school curriculum guides that call for teaching and learning about the United States Constitution and Bill of Rights. The volume is intended to encourage careful reading, analysis, and classroom discussion of primary documents and legal case studies on Bill of Rights issue in U.S. history and contemporary society. The book is divided into seven chapters. Chapters One and Two introduce the contents and meaning of the Federal Bill of Rights and provide a rationale and guidelines for teaching about constitutional rights and liberties. Chapters Three through Six include background knowledge and insights about the making of the Bill of Rights, key civic values in the Bill of Rights, the role of the Supreme Court in protecting constitutional rights, and Bill of Rights issues in five landmark cases of the Supreme Court. Teachers should draw upon the chapters of this volume to develop lesson plans and learning activities for their secondary school courses in history, civics, and government. Teachers will be able to use the substance of Chapters Three through Six in their implementations of twelve lesson plans included in these chapters. Chapter Seven of this volume is a guide to resources for teachers on the Bill of Rights. It includes a select annotated bibliography of various kinds of teaching and learning materials including video programs, poster sets, case study books, mock trial simulations, and handbooks with various types of lesson plans and teaching strategies. The appendices in this volume include the complete text of the U.S. Constitution and an annotated table and index of Supreme Court cases mentioned or discussed in Chapters One through Seven.

Patrick, John J., and Robert S. Leming. *Resources for Teachers on the Bill of Rights*, 1991. ED329489.

Ideas and information that can enhance education about the constitutional rights of individuals in U.S. history and the current system of government in the United States are included in this book. The resource guide contains nine distinct parts dealing with aspects of learning and teaching about the Bill of Rights in both elementary and secondary schools. Part One, "Background Papers," features four essays for teachers on the origins, enactment, and development of the federal Bill of Rights. A fifth paper discusses the substance and strategies for teaching Bill of Rights topics and issues. Part Two, "A Bill of Rights Chronology," is a timetable of key dates and events in the making of the federal Bill of Rights. Part Three, "Documents," includes eleven primary sources about the origins, enactment, and substance of the federal Bill of Rights. Part Four, "Lessons on the Bill of Rights," consists of nine exemplary lessons. The remaining five parts include: "Papers in ERIC on Constitutional Rights;" "Select Annotated Bibliography of Curriculum Materials;" "Periodical Literature on Teaching the Bill of Rights;" "Bill of Rights Bookshelf for Teachers;" and "Directory of Key Organizations and Persons."

Riley, Richard. "Common Ground on Religion." From the Desk of the Secretary of Education. *Teaching PreK-8* 26 (October 1995). EJ518654.

Outlines current federal Department of Education guidance to public school administrators and teachers on the extent to which religious expression and activities are permitted on school grounds and in the classroom.

Staten, Clifford L. "Teaching the U.S. Constitution: Values, Conflict, and Democracy." *Curriculum Report* 24 (September 1994). ED386398.

This newsletter essay explores the conflicts between individual values and community values and efforts to resolve these conflicts under the U.S. Constitution. The paper includes five sections (1) Introduction; (2) Value Conflicts and the Constitution; (3) Making Value Conflicts Relevant to Students; (4) For Example: The Indiana University Southeast Program; and (5) Conclusion. Six case scenarios focus on the conflict between individual values and community values. A teaching strategy is included.

Stern, Marc D. *Religion and the Public Schools: A Summary of the Law*, 1994. ED387389.

Intended to provide school officials an understanding of the legal aspects of common religious liberty and church-state questions in the public school context, this pamphlet attempts an objective summary of the current status of church-state law as it applies to the public schools. The document seeks to catalogue objectively the law as found in authoritative legal sources. Rather than citing all case law on a specific issue, where earlier decisions are subsumed or superseded by a controlling Supreme Court decision, the pamphlet cites only

the Supreme Court precedent. Only when the document believes rulings are cast into doubt by subsequent developments or where the decisions themselves are unusually doubtful does it comment on the correctness of decisions/opinions cited. The document includes sections on the law regarding: prayer in school; teaching about religion; use of classroom space for religious activity; holiday observances; release time programs; physical facilities; dual enrollment; distribution of religious literature; baccalaureate services and graduation; scientific creationism; curriculum content; secular humanism; compulsory attendance and religious holidays; dress codes; vaccination requirements; and teachers' responsibilities and rights. The pamphlet concludes with a subject index for quick reference. Included is a separate December 1994 update citing and summarizing recent changes in the law on religion and the public schools.

Thompson, Marcia A., and Charles R. Sass. *For Which It Stands: Flag Burning and the First Amendment.* Teachers Guide. 1995, ED395875.

This teacher's guide is designed to accompany the two-part videotape "For Which It Stands: Flag Burning and the First Amendment." The videotape and teachers guide should help students to (1) understand the emotion and significance of the flag-burning issue; (2) examine the free speech aspect of the First Amendment of the Bill of Rights; (3) evaluate the response of government officials to the Supreme Court's decision that a Texas law forbidding the desecration of the flag violated the free speech protections of the First Amendment and the debate over amending the Constitution to prevent flag burning; and (4) compare and contrast the many perspectives people have on patriotism, protest, and free speech. The guide contains four activities that involve class discussions and small-group work. The active learning approach encourages students to go beyond recognition or knowledge of facts to begin analyzing, synthesizing, and evaluating the issues and concepts being studied.

Urofsky, Melvin I. "The Flag Salute Case." *OAH Magazine of History* 9 (Winter 1995): 30-32. EJ509195.

Contends that, although religious freedom is a key feature of U.S. democracy, it has had a relatively short and modern history. Discusses the issues, court opinions, and historical significance of the 1940 *Minersville School District v. Gobitis* U.S. Supreme Court decision regarding Jehovah's Witnesses and the Pledge of Allegiance to the Flag.

Vanderbilt University, Freedom Forum First Amendment Center. *Religious Liberty, Public Education, and the Future of American Democracy. A Statement of Principle,* 1995. ED387420.

According to this document, citizens need to reaffirm their commitment to the guiding principles of the religious liberty clauses of the First Amendment to the Constitution. The rights and the responsibilities of the religious liberty clauses provide the civic framework within which individuals are able to debate differences, to understand one another, and to forge public policies that serve the common good in public education. Yet, the statement says that many communities are divided over educational philosophy, school reform, and the role of religion and values in public schools. In the spirit of the First Amendment, the Freedom Forum proposes six civic ground rules for addressing conflicts in public education that deal with (1) religious liberty for all; (2) the meaning of citizenship; (3) public schools belong to all citizens; (4) religious liberty and public schools; (5) the relationship between parents and schools; and (6) the conduct of public disputes. Includes a list of 17 organizational sponsors.

Vessels, Gordon. "The First Amendment and Character Education. Teaching Strategy." *Update on Law-Related Education* 20 (Winter 1996): 26-28. EJ522269.

Presents a lesson plan that teaches students to identify and examine the First Amendment as it applies to school-related issues. Procedures include researching a specific case and role playing its participants, followed by a discussion and written analysis. Includes three recent Supreme Court cases.

Volk, Kenneth S. "Technology, You and the Law." *Bulletin of Science, Technology & Society* 14 (1994): 203-08. EJ510737.

Presents examples of how the U.S. Constitution is continually being interpreted due to new technological developments. Through the use of a simulated course, students can actively participate in making decisions about our technological society.

Appendix
Glossary of Terms

Alien and Sedition Acts of 1798. Laws passed during John Adams' administration that allowed for the removal of aliens and made it a crime for people to publish or utter "false, scandalous, or malicious" statements against the government or its Federalist policies.

clear and present danger. A test or standard developed by Justice Oliver Wendell Holmes, Jr. and used by the Supreme Court to justify or restrict governmental limitations on speech. Speech that will directly lead to the harm of others (i.e., that represents a "clear and present danger") may be regulated.

coercive effect test. A test, advocated by some members of the current Supreme Court, for use in establishment clause cases. The test asks whether or not actions of the government coerce, or have the effect of coercing, people to support or participate in religious activities.

colonial period. The period prior to the American Declaration of Independence when the British established and maintained colonies in the territory that became known as the United States of America.

common law. Unwritten law developed by the English courts that was based upon custom and earlier judicial decisions. Common law became also became a part of the American legal tradition.

compelling state interest. A state interest of sufficient magnitude to supersede the interests of the individual. Government can only infringe upon fundamental rights when there is a "compelling state interest" to do so.

defendant. The accused in a criminal case or the person from whom relief for damages are sought in a civil suit.

doctrine of selective incorporation. The process by which the Supreme Court has selectively applied the protections of the Bill of Rights to the states through the due process clause of the Fourteenth Amendment.

double jeopardy. The Fifth Amendment guarantee that protects individuals against the second prosecution for the same offense and against multiple punishments for the same offense.

endorsement test. A test, advocated by some members of the current Supreme Court, for use in establishment clause cases. The test asks whether the government intended to convey a message of endorsement or disapproval for religion.

exclusionary rule. The rule that evidence obtained by law enforcement officials that violates the Fourth Amendment's protections against unreasonable searches and seizures may not be used against defendants in criminal trials.

equal protection. A requirement of the Fourteenth Amendment that prohibits states from the arbitrary discrimination of people within their jurisdiction in their enforcement of law.

establishment clause. The provision of the First Amendment that prohibits the government from establishing religion.

founding period. The period in American history between the Declaration of Independence and the ratification of the federal Bill of Rights (1776-1791).

freedom of expression. General guarantees of the First Amendment that includes the freedom of religion, speech, press, assembly, and petition.

general warrant. A legal document broadly granting the authority to search or seize without specifying the things or people to be searched or seized.

in loco parentis. Latin for "in the place of parent;" formerly a doctrine of the Supreme Court used to justify limitations of the constitutional rights of students.

judicial review. The power and duty of the courts to declare laws and actions of the state and national governments null and void if found in violation of the Constitution.

Judiciary Act of 1789. Statute passed by Congress that specified the organization and jurisdiction of the courts to be established under the government of the United States.

jurisprudence. The study of the law and legal philosophy.

libertarian. An advocate of the principles of individual liberty, private judgment, and constitutional order.

licensing of the press. The governmental practice of requiring licenses prior to publishing. In practice, this procedure gave the government the power of "prior restraint."

natural law. A higher law that comes from nature instead of governments. Such laws can be discovered by people through rational intelligence and would be found to grow out of and conform to the nature of being human.

natural rights. Rights that people possess by virtue of being human; rights that exist in a "state of nature" such as the rights to life, liberty, property, and the pursuit of happiness.

obiter dictum (dictum). Words of a court opinion unnecessary to the decision.

original jurisdiction. The court that has the legal authority to be the first to hear a case.

plaintiff. The complainant who brings an action and seeks relief and damages in a civil action.

precedents. Previous court decisions that help the courts to decide current cases and controversies.

prior restraint. The suspension of speech prior to its expression.

privileges and immunities. The legal opportunities and rights of each citizen. The Fourteenth Amendment requires that each state must legally treat all citizens of the United States equally and fairly.

probable cause. Fourth Amendment requirement that law enforcement officials present sufficient facts to a judge issuing a search or arrest warrant. Probable cause requires greater certainty than "reasonable suspicion."

procedural due process. The Fifth and Fourteenth Amendment's protection against the government's denial of life, liberty, or property without following fair legal procedures that apply equally to each person.

prosecution. Designating the government as the party proceeding in a criminal action.

reasonable suspicion. The level of suspicion that will justify, for Fourth Amendment purposes, searches by public school officials. The level requires that an ordinarily prudent and cautious person would believe that criminal activity or school rules have been broken.

respondent. The party against whom an appeal is made; appellee.

seditious libel. Written or spoken language that attempts to get others to engage in the overthrow of the government.

social contract theory. The theory holds that civil society and government are created by the agreement among people to surrender certain degrees of individual liberties they might express in a state of nature so that governments would have the power categorically to protect the significant remainder of their natural rights. These "natural rights" to life, liberty, and property categorically are at risk in the absence of government.

stare decisis. Latin for "let the decision stand;" doctrine of the courts to normally adhere to earlier precedents in deciding current cases.

state of nature. The hypothetical condition of people living together in the absence of civil society and government.

statute. A law passed by a legislature.

substantive due process. A judicial concept that requires that the meaning or effect of laws not violate fundamental rights such as life, liberty, or property.

three-part *Lemon* test. The test established by the Supreme Court to check for establishment clause violations. The test asks whether or not actions of the government (1) have a secular purpose; (2) have the primary effect of advancing or inhibiting religion; and (3) foster an excessive entanglement of government and religion.

unreasonable searches and seizures. The provision of the Fourth Amendment that protects against the government examining or taking one's private things without probable cause, a specific search warrant, supported by oath, and designating the people and/or places to be searched or seized.

warrant. An order from a judge authorizing an arrest, search, or some other specific act.

writ of assistance. A document giving the government broad authority to search and seize property.

writ of mandamus. An order that directs a public official or government department to do something. A writ of mandamus may be sent by the executive branch, legislative branch, or a court of law.